United States Court of Appeals

for the Second Circuit

APPELLEE'S APPENDIX

74-2104

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LeVASSEUR,

Plaintiffs-Appellees,

-against-

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T.C. DAVIS and THOMAS F. MILBANK,

Defendants-Appellees,

MICHAEL MOUMOUSIS and NAPOLEON C. GABRIEL, JACOB R. COHEN and JUNE COHEN,

Objectants-Appellants

Appeals from Three Decisions of the District Court

JOINT APPENDIX OF APPELLEES

Volume II

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LE VASSEUR,

Plaintiffs,

vs.

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T.C. DAVIS and THOMAS F. MILBANK,

Defendants.

67 Civil 5095

Before:

HON. EDWARD WEINFELD,

District Judge

New York, January 25, 1973
Room 506 - 10:00 a.m.

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THE COURT: Good morning.

Since this is a day of national mourning and this matter has been scheduled for some time, we are proceeding, but I would ask that before we call the calendar and I hear the matter we all stand for a minute of silent tribute to the late President Johnson.

(Pause.)

THE CLERK: In the matter of Betty Levin, Alleghany Corporation and Robert LeVasseur, plaintiffs against Mississippi River Corporation, Missouri Pacific Railroad Company, Robert H. Craft, T.C. Davis and Thomas F. Milbank, defendants.

MR. POMERANTZ: We areready for the motion, your Honor.

THE COURT: Those who appear in support of the proposed settlement, how much time would you require?

MR. POMERANTZ: I want to venture a figure. Where five or six of us are speaking as proponents, I would estimate between an hour and a half and an hour and three-quarters.

THE COURT:: How many objectants are there?

MR. GARFIELD: If your Honor please, I am an objectant. My name is Edward Garfield and Edward Garfield and Barbara M. Garfield are objectants.

THE COURT: How much time would you require?

MR. GARFIELD: Half an hour, your Honor.

THE COURT: Are there any other objectants?

MR. COHEN: Yes, your Honor. I am an attorney representing two objectants, Jacob R. and June Cohen.

THE COURT: How much time would you require?

MR. COHEN: About 15 minutes, your Honor.

THE COURT: Have you submitted any papers in opposition?

MR. COHEN: Yes, sir, I have some papers in opposition which I would like to submit to the Court at this time.

THE COURT: Have you served papers on those who favor the plan?

MR. COHEN: Pardon?

THE COURT: Have you served your papers on the other side?

MR. COHEN: Yes, I have, your Honor.

THE COURT: Have you filed them with the Court?

MR. COHEN: No, I haven't.

THE COURT: I don't recall reading any papers on behalf of your clients.

MR. COHEN: Well, the papers are really in the nature of a notice of intention to object and I did not file

them with the court at the time, your Honor.

THE COURT: But have you filed the substance of your objections and served them on the opposing side?

MR. COHEN: I have served them, but I have not filed them.

THE COURT: Well, file them now.

Is thereany other objectant?

You may step forward, please.

MR. POLANCER: My name is Merrill Polancer. I wrote a letter --

THE COURT: I was going to say you wrote a letter, did you not?

MR. POLANCER: I did, sir.

THE COURT: How much time would you require?

MR. POLANCER: 15 minutes.

THE COURT: Are there any others?

MR. INGERSOLL: My name is Winchester F. Ingersoll, Jr. representing myself. My objections are more in the nature of slight modifications which I think would be helpful not only to the plaintiffs, but to the defendants and to you as Judge.

THE COURT: Have you prepared any papers?

MR. INGERSOLL: I have. I sent a summary in to all the lawyers representing the plaintiffs and the defend-

ants. I sent a copy to the clerk, John Livingston, and I have a clearer copy which I can present to you. The Xerox copy didn't come through too well on the memorandum and I have a handwritten --

THE COURT: What is your name?

MR. INGERSOLL: Winchester F. Ingersoll, Jr.

THE COURT: Well, the Xerox copy certainly didn't come through very well. I had difficulty reading it.

MR. INGERSOLL: I have a better copy.

THE COURT: Submit it.

MR. INGERSOLL: Would you like me to submit it to you now, sir?

THE COURT: You may submit it now.

Are there any other appearances on behalf of any person, either in favor of or against the proposed settlement?

MR. BALLARD: Your Honor, my name is Ernest Ballard with the firm of LeBouef, Lamb, Leiby & Mac Rae representing the Franklin National Bank as the trustee of the voting trust which Alleghany created in 1957 which holds a great portion of the B stock which is the subject of this hearing. I wish to note our appearance, but we do not wish to be heard.

THE COURT: In additionto the persons who appear

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this morning as objectants the Court has received a number of letters and these will be filed as part of the record.

MR. WESSON: Your Honor, I appear as an objector. I wrote you a letter on November 3rd.

THE COURT: Your letter has been considered and it will be filed and considered in connection with this pending motion.

MR. WESSON: My name is William Wesson, a stockholder. May I present more material this morning?

THE COURT: Have you served it on the others?

MR WESSON: No, sir.

THE COURT: Serve it on the attorneys. Do you want to be heard?

MR.WESSON: Yes, sir.

THE COURT: How much time would you require?

MR. WESSON: Is it proper for me to read the letter I wrote to you?

THE COURT: There isn't any point in reading the letter because I will go over it, in any event.

MR. WESSON: I would think ten minutes, sir.

THE COURT: Do you plan to read the letter?

MR. WESSON: I would like to read the papers I brought in this morning. I would like to read the letter, if you will allow it.

THE COURT: What is the purpose of reading the letter? I said I would examine it very carefully and consider it very carefully.

MR. WESSON: Very well, sir.

THE COURT: Unless you have something to add to the letter.

MR. WESSON: I thought the people present might like to hear the letter.

THE COURT: If you want to read it, you may. I don't see any purpose in it.

I think I might mention the fact I have to leave this afternoon. I am sitting as a judge in the multi-district panel litigation in Los Angeles. We are having a session tomorrow.

Are there any prospects that those favoring the plan might cut down the time schedule for their presentation? I have gone over all the papers that have been submi-ted.

MR. POMERANTZ: Yes, there is, your Honor. We will cut it down in light of your Honor's observation and we will waive the necessity of Mr. Wesson reading the remarks since he says it is just a copy.

THE COURT:If those in favor of the plan desire to answer any of the papers that have been submitted

this morning, or any arguments made, you submit whatever is necessary.

MR. POMERANTZ: Yes, sir.

MR.GARFIELD: If your Honor please, I will reduce my time to 20 minutes if you give me leave to file an additional memorandum.

THE COURT: Yes. In your case, too, I am going to ask there be more specific reference in your affidavit, Mr. Garfield. There have been generalities in the briefs and I think there ought to be more specific answers to his allegations. You will have additional time too.

MR.GARFIELD: You are directing that to the parties, your Honor?

THE COURT: Yes.

MR. GARFIELD: I do have leave to submit an additional memorandum?

THE COURT: Yes.

MR. GARFIELD: Thank you, your Honor.

THE COURT: If you are ready to proceed, please proceed.

What is it, sir?

MR. INGERSOLL: I want five minutes time to supplement my letter, if I could. I think it would be

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helpful. Ingersoll is the name.

THE COURT: All right.

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MR. POMERANTZ: In view of your Honor's statement -- I am Abraham Pomerantz, your Honor.

In view of your Honor's statement that you have read the papers, I can, I believe, cut my remarks, as contemplated, quite considerably.

I represent, your Honor, one of the three co-plaintiffs, Robert LeVasseur who, as you know, is representing with the other plaintiffs and other counsel the entire Class B group of shareholders aggregating 40,000 shares and we have agreed yesterday to divvy up our time so as to avoid needless duplication and we will try to stay within that plan.

It's my assignment, your Honor, to give you a brief, a very brief, outline of only so much of what otherwise would be unsufferably long background as is necessary to orient the present litigation.

I refer specifically to a litigation, the precursor of this one, brought ten years ago back in December of 1963 in a district court in St. Louis, Missouri.

THE COURT: That is the one that went into the Supreme Court?

MR. POMERANTZ: That is right.

THE COURT: And that is the one that held that

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Class B had certain rights?

MR. POMERANTZ: Right. The only thing I will advert to --

THE COURT: It has an independent right to vote on certain matters. The other papers claim this presents a position of conflict between the Class A and Class B stock and one of the difficulties is to effect the merger of this company, which is desirable, in light of new competitive conditions in the railroad industry.

MR. POMERANTZ: I have very little more to say beyond perhaps saying that it was that litigation and its decision which was the cause of and the basis for the commencement of this dividend litigation which commenced soon after the Supreme Court had spoken and had announced, as your Honor recalls, at least Judge Douglas did --

THE COURT: A predatory kind of a situation, the worse he has ever seen.

MR. POMERANTZ: I will be back to my chair in about four minutes, I suspect.

I think it may be important to underscore just one fact emerging, not a fact but an implication, I should say, emerging from that litigation and I am done with it. That is that the adjudication, the finding, if you wish, by the Supreme Court that the A's controlled -- as you know by

Mississippi -- which were casting covetous eyes on the B's and their much larger values is what precipitated this litigation because otherwise we have that intolerable situation of having asked the Court to interfere with the business judgment in the declaration of dividends which, as you know from your reading, is something courts are very loathe to do.

But in this situation we are aided by the fact that the Court held that -- well, it found bad faith on the part of Mississippi and of the promulgators of the so-called merger plan.

That is what emboldened the three of us. I should have added, the same team that is here today of Donovan, Leisure --

THE COURT: They brought the suit that went into the Supreme Court, the same team?

MR. POMERANTZ: Yes, the same team brought the suit in the Supreme Court. There was Mr. Elsen associated with Mr. Lowenthal, Donovan, Leisure in the person of John E. Tobin and Mr. Walton and there was myself. So when the Supreme Court almost gave us, you might say, the green light, we brought this action largely encouraged by the findings there.

Since you are quite aware of that case, let me

give your Honor what would be, I hope, a four or five-minute view of what we conceive to be the pros and the cons of our litigation and how we came to settle it and what factors I, for one, took into account and I think I speak for my co-plaintiffs.

Primarily the fact situation is that the B's were accruing earnings at the rate of hundreds of dollars. I will not bore you with details and specificity. The records will show that. The B's were accruing, when we brought this present lawsuit, several hundreds of dollars per B share per share and were kind of eye dropping out to the B's $5.

THE COURT: That is the same rate being paid to the A's which was the maximum that could have been paid.

MR. POMERANTZ: That is right, the A's being really a preferred stock ithad to be paid before the B's could get anything. It was and is our contention that with these huge earnings accruing on the B the $5 dividend paid was no more than a peppercorn and was so grossly inadequate as to give us purpose or reason to bring lawsuit which is generally considered as bottom drawer cases. Actions to compel dividends in the ordinary situations are not brought by sophisticated lawyers. But this was an extraordinary case.

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Its extraordinary nature was pointed out by the Supreme Court but was more dramatized, I think, by the unprecedented facts of this disparity between these huge earnings accruing and the almost meaningless dividends paid out.

Against our position that we hadn't had a good lawsuit for dividend, I would like to kick off without more than the syllabus type of response to it.

First of all, Mr. Willis of Dewey, Ballentine representing Mopac or representing Mississippi rather takes the view that the whole question is how much is too much surplus. Our charge, after all, is conditioned on the showing of the proposition that they were squerreling away more money than they needed and, as your Honor might imagine our very expensive depositions here reveal sophisticated opinion by men of some executive eminence that it wasn't too much.

THE COURT: I want to ask a question about that.

There is the affidavit by the executive officer of Mississippi, or, at least, it may have been a Missouri-Missippi officer and it states that one of the reasons that dividends were not declared is because of the need for the use of capital in order to purchase securities in other railroads to protect their

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but there is very little in the papers as to the substance of the testimony indicating the executive or the business judgment that was applied by these officers.

You do refer to the depositions and their testimony, but I don't have the substance of it and I think that somebody ought to point out where there is the deposition testimony and that subject instead of the general reference to it.

In other words, the defense is that this was a business judgment exercised by the board of directors in the interest of the corporation. It not only went to the purchase of securities but other corporate purposes.

MR. POMERANTZ: Right, sir. I am sure Mr. Willis is heeding your Honor's observation and will supply you with chapter and verse as he conceives it. Let me say I don't agree with Mr. Willis.

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THE COURT: That makes a lawsuit, doesn't it?

MR. POMERANTZ: That is right. That is what makes one of our problems. The argument further made by Mr. Willis is that this would get the Court into kind of the board room of Mopac as a de facto director and this wouldbe both an interference with business judgment, I think that courts are supposed to shy away from, although I think in latter days they find themselves part of it and, in any event, the issues of fact are so intricate

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and sophisticated as to defy judicial scrutiny.

I may be doing injustice to him but I am trying to define it.

My response to that, again in broad terms, necessitated by my wish to cut the argument down in time is this: In the first place, I believe when your Honor looks at the facts which you have just asked for and which will be supplied and our responses to it, you will find, that granted, that there is a wide zone allowing for play of directorial discretion. I think the facts here take it beyond the zone, into the area which represents a perpetuation of the finding of the Supreme Court that the action of the Mississippi people here was not in good faith.

They also throw at us, your Honor, that old thing known as the business judgment rule which, as your Honor knows, is supposed to create red lights around the acts of the board against judicial intrusion. I think the misconception of the application of that rule needs to be pointed out in the few minutes I have.

I think it is basic to the position of our strength here. That is the business judgment rule operates only when a disinterested board of directors or a disinterestc controlling shareholder is exercising a non-personal

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or a non-self-interested business judgment. The contrary rule is applicable where a management afflicted with a conflict of interest is making decisions.

THE COURT: But they contend that most of the directors were not interested directors during the majority of the time that the board limited the dividends on B stock to $5.

MR. POMERANTZ: We have many evidentiary answers to that. I would say the top one or two would be these: To begin with, Mississippi owned and controlled the majority of the A stock and designated all of its directors of Mopac. Now your Honor knows that that, per se, does not constitute control or domination. There is a presumption in the law that men do their duty honestly and that the fact that they are put in by a dominant shareholder who has an economic self interest in these transactions with the minority does not automatically create a conclusion of domination.

However, in the facts of this case where the same board of directors attempted to perpetrate the plan that was thwarted by the Supreme Court in response to our objections in the Missouri litigation, I think we have at least some evidence -- I am not purporting to give you all of it -- that there is a cloud, to put it mildly.

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THE COURT: You say to thwart the plan. My recollection in reading these papers is that the Supreme Court stated expressly that it did not pass upon the plan. It's only concern was with the rights of the Class B stockholders and its holding was confined purely to that question.

Am I wrong on that?

MR. POMERANTZ: You are right, and I think only categorically right because while it's true they say that and obviously meant that, it is no less true that the opinion of the Court undercuts the Court's own statement.

You may remember, I think it was Hugo Black's reference to the plan as representing a swap of four rabbits for one horse.

THE COURT: I think that was Mr. Justice Clark.

MR. POMERANTZ: I am sorry, sir, you are right and I am wrong.

Then the reference I have referred to and your Honor has noted of Justice Douglas. While it's true that all that was before the Court was the issue of whether the B's had a right to vote as a class in defense of the preservation of the privileges and priorities and hearings in their shares, I don't think it would be too much to suggest that the Court thought the plan was pretty

outrageous and I think oozes out of many cracks and crevices of the opinion.

This would not be the time, unless your Honor wishes to give me the time, to discuss -- it would probably take an hour or two. There are very extensive depositions largely taken by my associate, Mr. Elsen. They are precisely to the point to ascertain whether the actions were done as disinterested directors or, rather, as servants of the board to the designor of the directors, to wit, Mississippi.

In any event, that is the issue and for present purposes all I promised to do in my statement to your Honor is give you kind of the outline of the pros and the cons of our contentions.

But I want to finally get, before I take my chair, to what I conceive was the most important point that Mr. Willis makes where I have to yield him a debating point. That is if we win this lawsuit and persuade your Honor, as we think we very well might, that these dividends have not been adequately dispersed to the B's, we are beginning the war. We haven't ended the war. That will be all right for now, but the practice in these cases, I take it, is for the Courts either to reserve jurisdiction in perpetuity to make sure that next year and the year after the opinion or

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decision of the hopefully favorable court to the plaintiffs is not sabotaged by the same type of thing or, alternatively, to require further litigations every time the plaintiffs feel they are being done in by united dividend payments.

I must say that is true and it bothers us for several reasons.

First of all for the obvious reason that it's permanent warfare in which the courts are involved, lawyers are involved, executive distractions are involved, costs are involved and, second, because as pointed out in the affidavit of Mr. Lee Jones submitted by the defendants, merger is more than a luxury in the railroad business today. It's almost a necessary way of life to meet the competition of expanding railroads.

I find it easy to believe and to yield my adversaries point that with this civil war going on between the A's and the B's, any merger with other railroads is an impossibility and, as a matter of fact, Mr. Lee Jones cites one or two or three cases.

THE COURT: You mean the railroad shied away from this merger the minute the railroad discovered this stock situation?

MR. POMERANTZ: Right. We have attempted to fashion a decision, a plan of settlement. We, Donovan

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Leisure and Mr. Elsen, his associate Mr. Lowenthal, and I and not least of all the Alleghany people who have, as your Honor knows, what is a $50 million stake in this enterprise.

We have labored hard to take this out of the courthouse and into the bargaining room. What we have worked out is a plan that Mr. Walton will tell you more about which has at least a negative virtue of settling the case, of getting rid of all of this confusion and saving all this expense and distraction and opening the doors to merger.

We think, but I don't want to encrouch on Mr. Walton's authority, that we have hammered out a fair, if not a very good and, I think, it is a very good settlement of a difficult but, by no means, impossible litigation.

THE COURT: You have a second cause of action charging a conspiracy. Isn't there is a second cause of action to depress the B stock whereby denigrating statements were made and one of the affidavits states that there is no direct evidence that has been unearthed in the rather lengthy discovery proceedings upon which the plaintiffs can go on, that is direct evidence to support the charge of conspiracy and that of necessity you would have to rely on circumstantial evidence with permissible inferences

to the trier of the facts.

Do you agree with that?

MR. POMERANTZ: If your Honor permits, I don't like doing this, but this is Mr. Elsen's complaint and I think it would be fair to him if your Honor will permit me to duck that question and take it up with Mr. Elsen.

Thank you very much.

THE COURT: Mr. Pomerantz, I take it then from what you said -- and it's implied by the fact that you signed the stipulation of settlement -- that in the terms of your experience you deem this a fair and reasonable settlement taking into account all the continent possibilities that come into play in a lawsuit?

MR. POMERANTZ: I do, sir.

MR. WALTON: I am Lauck Walton. I represent one of the plaintiffs, Alleghany Corporation.

Alleghany Corporation's interest in this Missouri Pacific Railroad goes back to 1929. Since that date we have had a position in the common stock or its predecessor.

THE COURT: You own 52 per cent at the present time?

MR. WALTON: Yes, your Honor. Slightly near 53 per cent, 52.6, I think.

It is my role to talk to you briefly about the

negotiations that led to this, omitting all the earlier conversations that led to naught, also to outline the settlement terms and to deal with some of the objections.

Prior to 1970 the parties had had some conversations but they were very far apart indeed. Over $2500 apart in the price that was asked and the price that was offered.

In 1970 in the summer I went to St. Louis, Missouri and there I was engaged in discovering an enormous file of documents from the Missour Pacific Railroad and at that time I met Mr. Mark Henry who was the vice president and general counsel of the railroad and at that time I became converted to a theory which I think is best espoused or most vigorously espoused in the affidavit of Mr. Jenks and that is that we had better, as investors in this corporation, hang together or we would all hang separately because the time had come in the railroad industry when if this railroad was unableto effectuate mergers and to protect itself from the situation arising in the southwest and in the midwest, our investment in B stock as well as Mississippi investment in the A stock, the minority A's investment in that security, the minority B's investment would all be lessened.

It would not be worth what it should be worth. The railroad would not be able to make what it should make. I may have been a late convert to that but I think everyone of the negotiators who participated here over two

years of very, very difficult negotiations came to believe that. These negotiations were not merely those of counsel although eminent counsel did participate the late Thomas E. Dewey, Judge Peck and my partner John Tobin were present at virtually every session. But the parties themselves had representatives there, Mr. Craft, who I think could be characterized as always the chief financial adviser of Mississippi throughout this , Mr. O'Leary, the vice president of finance now of Missouri Pacific, Mr Ramsdell of Alleghany Corporation, Mr. Burns, the vice president of finance of Alleghany. The parties didn't stop there.

THE COURT: You called separate consultants in, did you not, Dr. Sheraton and Dr. Hawkins?

MR. WALTON: They were for the litigation. That was later. In this case it was Kuehn, Loeb and Eastman,Dillon Union Securities who advised the parties respectively. That was Kuehn,Loeb for Alleghany and Eastman,Dillon for Mississippi.

I have seen over 25 very detailed plans of recapitalization and the parties moved a great deal but by May 1972 we had not reached a resolution and counsel were forced to report to you that it did not appear that we could bridge the remaining gap. At that time there was a differenc of about $2800 as against $2000.

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In other words, Alleghany wanted $2800. We thought that was a fair value for the securities and Missouri Pacific were prepared to offer $2000.

All of this, I don't mean to imply that it was ever all cash or all stock except in one instance which I will come to. These were complex packages of securities. They considered warrants, convertible securities, creating debt, splitting the stock. There is really no financial device that I can think of that wasn't in one or another of those plans.

As you know, your Honor, despite the breaking off of negotiations in May, I think many of us simply refused to believe that the railroad could survive without a settlement here. I don't mean that the railroad is going to go under tomorrow if there is not a settlement.

By settlement I mean a recapitalization of the railroad and a permanent resolution of the conflict between the classes. But the Rocky Island merger is now pending in the courts.

It poses a severe threat to this railroad, in my opinion, and I might say, your Honor, and to the considerable amusement of some of the Sullivan & Cromwell lawyers, I am the only railroad lawyer essentially in this proceeding.

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Everybody else is a proper and upstanding security lawyer.

With that background we did finally come through the statesmanship and the direct intervention of the chief executive officer of Mississippi and the chief executive officer of Alleghany.

We finally came to a resolution of this matter along the lines presented to you.

Essentially that is a settlement in which Mississippi and Missouri Pacific offered the following package:

Missouri Pacific would pay to each B shareholder $850 and exchange each B shareholder for 16 shares of new common stock. Mississippi would, simultaneously, tender 400,000 400,000 shares of that stock just issued which amounts to 63 per cent of it.

Alleghany agreed to tender its stock.

The tender would be made at $100 a share. For the A holders there would also be benefits in that the A would become convertible after one year into common and the A would become cumulative, a feature that it does not now have.

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THE COURT: What is the reason for the committed tender by Alleghany of the shares that it's to receive to Mississippi?

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MR. WALTON: The reason Mississippi tendered or the reason --

THE COURT: That Alleghany is required to tender. It's under a commitment to tender.

MR. WALTON: Yes, it is. I have seen in the affidavits of the others the suggestion that Alleghany was extremely eager to have cash. I have not received that impression from its officers.

It has always, however, been a condition of any agreement from the very beginning of these negotiations that Alleghany has to get out of the security virtually entirely because we would have held an enormous block and there is, under the Constitution of the State of Missouri, cumulative voting required. We would have had a position. We would have had a large voice in the management if we were to vote the stock.

Of course, you understand, your Honor, we do not vote the stock at the present time because Alleghany owns a trucking company but if Alleghany were to dispose of the trucking company presumptively --

THE COURT: Isn't it correct that Mississippi wants Alleghany out of the picture?

MR. WALTON: That is correct.

THE COURT: That is the reason for it, one of

the reasons.

MR. WALTON: Certainly the principal reason. Alleghany is not adverse to getting out of these terms. We believe that this is a fair package and gives us full economic value for our security.

I think the most notable thing about this recapitalization is the very unusual protections that it has for minority holders.

First, the Missouri Pacific cannot issue this stock unless it goes down to the Interstate Commerce Commission and it shows in a section 28 proceeding -- which the Interstate Commerce Commission has exclusive and plenary position over -- they must show that the stock is being issued for a lawful purpose, that it's compatible for the local interest --.

THE COURT: Does it pass on the fairness or reasonableness of the plan as far as the stockholders are concerned?

MR. WALTON: It passes on the reasonableness or fairness of the issuance of the Missouri Pacific. It does not pass on the fairness to the B. It does not specifically pass on the fairness, for that matter, to the A but it looks at the corporation as a whole.

THE COURT: In terms of totality?

MR. WALTON: Yes, sir, that is correct.

I do think that is a substantial protection for the corporation. Furthermore, we have written into this agreement and all the parties were agreed that this should be written into the agreement that a majority of the minority, that is a majority of the --

THE COURT: And the A stock each have to vote in favor of the plan. That is included within the 75 per cent provision of each class. There must be a majority of each minority.

MR. WALTON: But it is in addition to the 75 per cent proposal. 75 per cent must vote for it but in addition the majority of the minority.

What I would like to have come before this court with was a plan that not only gave every minority stockholder exactly the same rights as Alleghany but gave the minority stockholders something more than Alleghany had in order to underline the fairness of the plan.

We negotiated in behalf of the minority an option because at that time we believed that it would afford favorable tax treatment to all of them. In that option, which we both agreed any minority holder would have been allowed to elect not to take --

THE COURT: Then they are allowed to take 24-1/2 shares instead of the $850 and the 16 shares?

MR. WALTON: That is correct, your Honor.

THE COURT: And for tax reasons, apparently based on the advice of independent tax counsel, they felt it would be a tax lien?

MR. WALTON: Yes, sir.

THE COURT: I understood that the attorneys had independent tax counsel who gave them that advice.

MR. ELSEN: Yes, your Honor, if I may answer while the point is before the Court. Not only was that tax of a dubious nature, but we were advised by tax counsel that after the final research and the calculations of earnings and profits, and the like, there was a distinct risk of the unavailability of the option because of the technical provisions of the tax law which would create income consequences for some of the 16 shares, which under the present proposal would be received tax free. Two-thirds of the package is tax free. However, if we had permitted the option to continue, your Honor, that tax free receipt of 16 shares would have been jeopardized.

Therefore, we felt that on balance it had to be dropped.

THE COURT: All right.

MR. WALTON: I can say to you, your Honor, that I worked awfully hard to get that option written in and

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it is a personal disappointment to me that the technicalities of the tax law destroyed it. I still don't understand it.

THE COURT: A great many people don't understand the tax laws.

MR. WALTON: I would like now to pass to the objections. Mr. Elsen is going to address himself also to some of the objections. However, in particular I think that it would be fair to characterize the objection here that has any real substance or merit, if it has any merit, it has got to be on the basis that we are not getting enough for the stock. There just isn't enough being paid.

Alleghany, our client, has a $26 million investment in these securities. We held it since 1929. We have spent literally millions of dollars protecting it. We fought for it in reorganization. It was the longest reorganization in railroad history. We are not about to take for it any less than we think it is worth.

This is not an ordinary litigation where the lawyers can negotiate a settlement. This settlement was made and approved by the Alleghany Board of Directors based on a plan and it was the opinion that this was the value of the stock. They could have been wrong.

The Court has to give enormous weight to this

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If Mr. Garfield, for instance, is right we are throwing away $50 million or maybe $150 million. It seems to me not likely that those who are sophisticated in this field would make that sort of an error.

The analysis of the objectants is based almost entirely on looking at the book value. The book value is one of the things, or the principal thing, cited by the Supreme Court, for example, in the quotation which your Honor quoted to Mr. Pomerantz. The book value is important. It is illustrative of the rights of the A stockholders and the B stockholders, but is not a criterion by which the value of the A stock can be judged.

We submitted a memorandum of law and there is eminent authority both in the Court of Appeals here and in the Supreme Court in the Sweibacher case and in numerous Interstate Commerce Commission cases.

We have the affidavits of Mr. Byrnes and of Mr. Jones, who is an independent consultant, a vice-president of the First Boston, to the effect that this is simply not an important consideration and, indeed, the only reason it should be given any significance is because of the conceivable possibility that the whole railroad system in this country might be nationalized, in which case book value would not be the sole consideration in a condemnation,

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but it would have more weight.

In this respect, the argument is also made that because $850 of this settlement may be treated as a dividend or may have ordinary income treatment under the tax laws that this should be considered the part that settles the suit and that 16 shares should be thought of as the exchange for the B stock. Nothing in the settlement agreement says that. Noneof the three parties to the settlement agreement have ever characterized any portion of this consideration as anything other than being the full consideration for the settlement.

Anybody is free to argue that more of it or less of it is in payment for the settlement of the suit and more of it or less of it is in compensation --

THE COURT: It was suggested the exchange should have been on the basis of shares instead of cash.

MR. WALTON: Yes, sir.

THE COURT: Is there any reason why that wasn't done?

MR. WALTON: Yes, sir. There are several reasons why that wasn't done. Alleghany, I think, would not be terribly enthusiastic about having a permanent minority position which would result. Supposing that this settlement were deemed fair on the money aspect and that,

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therefore, we would get 24-1/2 shares, we would have an enormous minority position, but we would not have any real control over our investment.

THE COURT: In effect, you have a veto power.

MR. WALTON: Today we have a veto power, but with 24-1/2 shares we wouldn't, in effect. However, that is not the prime consideration. The prime consideration is that there is not enough money, the combination of money and shares is not fixed, but there are absolute limits to it and I think perhaps Mr. Willis might be better able to explain it than I.

However, Mississippi wishes to retain control of this corporation and when it gives 24-1/2 shares it dilutes itself downward in the neighborhood of 50 per cent. That is unacceptable to Mississippi and it will not agree.

Now if they aren't going to vote for a settlement, we are wasting our time. Consequently, this is the basis we have to proceed on - some cash and some stock.

We had at one time an offer of all cash. That was rejected. It might be conceivable that something along that line could have been worked out, but what Alleghany is looking for, and what we believe every B stockholder should be looking for, is the total value of the package and not a concern about the mix is because the tax consequences

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not only as far as Allegnany is concerned, but for any of these shareholders is something in the future. We have no idea what the statute will be. This is an area of the law in which there are reforms presently proposed for one item. For a second item anyone with a substantial stock has the ability to have a tax plan, and Alleghany doesn't intend to have a tax plan, but do the best it can with this money.

t3/2 But I think those arguments about the inadequacy of the amount received are to some extent irrelevant if you accept the premise that this stock has to be valued on its earnings. Virtually all the cases, and certainly the affidavits of the experts here, and even Mr. Garfield's own affidavit in attempting to evaluate on the basis of earnings, do take the position that this is at the minimum an important and in all our affidavits virtually the only important factor to be considered.

When you value the total worth of the corporation on the basis of earnings, you capitalize it on the basis of a multiple. The lowest figure in any of the affidavits I believe is 8. The highest is 10.

Assuming 25 million as the earnings -- and the earnings are in that neighborhood -- you get a value, an absolute minimum of $200 million and an absolute maximum of $250 million for this corporation

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Now, you can fiddle with these figures and you can make it look as if the B stockholders are not getting their money's worth here -- and the particular method that has been seen in this proceeding is to commit the following fallacy: We take $5 of earnings for the A share. There are 1.9 million A shares roughly. That is $9,500,000 out. There is $16 million left. That, of course, all belongs to the B shares. And capitalizing that, we come to ten times earnings.

On the 40,000 shares available we come to a value of well over $4,000 a share of this stock.

The only trouble with that theory is we have to have our cake or eat it. If the A stock is nothing but an income stock, as all the B objectants are saying, then it has got to be valued as an income stock and if it is valued as an income stock at ten times $5 earnings, that means it would bear a value on the market of $50 a share or eighttimes the earnings of 40,000 shares.

There are no stocks comparable to the Mopac. It is a reasonably sound company. The market puts a value on the stock and puts a value on this stock prior to the announcement of the settlement negotiations of about $70. And, of course, once you attribute a value of $70 to each o those 1.9 million shares then this price

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becomes just about what the B stock is worth, that is, 2,450, or somewhere in that range, give or take a few hundred.

That is really all I have to say on the major objection, that is, that the B stock just isn't getting enough here; that we ought to be entitled to $8,000 of book value.

Sir, the $8,000 in book value -- as Mr. Jones points out in his affidavit, the New Haven a year after it went into bankruptcy had $80 a share book value.

THE COURT: I am familiar with that because I think you may ormay not know I sat on the merger of the Penn Central and the New Haven and I wrote a dissenting opinion actually on the question of the valuation of the shares. I believe $87 was the rate fixed. And the majority accepted it and I questioned it at that time. By the time the inclusion proceeding took place the stock was down by about, as I remember, $30 and it didn't take much longer where you all know it went to.

MR. WALTON: Yes.

As a matter of law it is worthless, I believe, Judge Anderson having so held.

There are a number of other objections. I don't want to slight them, but I would characterize them as minor objections that I do want to deal with and most of them are

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addressed to Alleghany's position in this.

Mr. Polancer in his letter wasn't entirely clear, but he seemed to feel that Alleghany should not purchase Mississippi or Missour Pacific's securities for a long period of time. I don't know exactly what he means by that, but there is a provision in the agreement which prohibits Alleghany from purchasing those securities for three years. Mississippi seemed to feel that was adequate, and I don't see really that it has much relevance to the situation anyhow.

Mr. Polancer also has a problem in that he says he is both a Missouri Padfic stockholder and an Alleghany stockholder and he has it in his mind that he might want to sue Alleghany if it is an improvident settlement. And that section of the agreement might conceivably prohibit him from doing so.

I stipulate that Section 10.8 does not prevent any Alleghany stockholder from suing Alleghany. That does not prevent Mr. Polancer from suing on the ground he is not a representative stockholder since he has a conflict, since he would have been a stockholder of Missouri Pacific B stock, but Section 10.8 is intended to apply to only other members of the class that this Court has to deal with in this settlement application.

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THE COURT: One of the objectants inquires as to what the status would be as far as an appraisal is concerned under Missour law.

MR. WALTON: Your Honor, I haven't really had an opportunity to consult with all these gentlemen, but my opinion is that this agreement doesn't affect his right of appraisal and if he wants to know he ought to consult a Missouri lawyer. I have no opinion. I never looked.

THE COURT: All right.

MR. WALTON: Do you feel we should deal with that, try to preserve it, under Missouri law whether he has the right of appraisal?

THE COURT: I certainly don't know the answer.

MR. WALTON: Sorry, I don't either.

There are also someobjections in Mr. Cohen's notice which I gather was not filed with the Court, but essentially quite a number of the initial ones go to the notice, his charge that the notice is the defective in that it fails to contain a discussion of the evidence and fails to disclose consideration for dismissal of the derivative defendants, and that type of thing. The notice is not intended to be a complete exposition of everything in the case.

Everything in terms of all the documents,

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virtually all the documents [illegible]nded to use at the trial are on file with the Circuit Court. We had reached that stage of designating documents.

There are numerous affidavits discussing the facts and the merits. It seems to me that that objection is not well taken. Itmisconceives the purpose of the notice. The notice is to alert the stockholder. It is not to give him a complete exposition of all the facts or all the subject matter to be considered by the Court.

There are a number of objections that have to do with fees. It is my understanding that these are to be handled at a separate hearing, and I do not intend to address myself to any of those except one. That is an allegation that there is no indication of why Missouri Pacific decided not to oppose Alleghany's application for fees.

Ican say I do not know why. I told them, as I was obligated to do under the local rules here, what our fee would be and counsel volunteered that he did not intend to oppose it. I told him at that time that he was free at any time prior to the hearing to withdraw that statement and to oppose it if he wished. I stand on that statement.

If for any reason the application is defective in

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any respect, or if he believes it excessive, he should be free to oppose it and he is free to oppose it. He understands that, I think.

Mr. Cohen objects in that the notice fails to disclose the basis for the determination that the value of each share of these stocks was 16 shares. The basis was three years of extremely hard bargaining, and that's all you can say about it. He says it fails to disclose the payment of the 33 million and another objection of a similar nature.

I would respectfully suggest that there are two cases within the plenary jurisdiction of the Interstate Commerce Commission because certainly the Commission cannot approve this if it is going to have an adverse effect on Missouri Pacific. That is the real reason for requiring their approval.

Also I would note that both Mr. Jenks in his affidavit and Mr. Jones in his affidavit deal with this question and assert it will not have an adverse effect.

There was one final thing from Mr. Cohen. He suggests that the settlement is defective and that Mississippi does not have the financing to consummate the offer, and it was a condition of the settlement that they do so. I would like to report to this Court that they have

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have satisfied that condition to Alleghany's satisfaction. It was Alleghany that had to be satisfied on that condition. We have seen their formal commitment of financing and it is in all respects satisfactory to us.

I think, your Honor, I can say in summary I have never engaged in a case in which the settlement negotiations were so protracted or had such eminent participants in which an enormous amount of time and money was spent. I think we have demonstrated that it is adequate for any of the stockholders.

The negotiations were carried on by informed people, by experts in a variety of fields. The negotiators were certainly sophisticated. None of the objections are really substantial.

And perhaps,most important of all, if any A stockholder or any B stockholder intends to remain an investor in this corporation, this recapitalization is essential to preserve their investment because, as Mr. Jenks has pointed out if this corporation doesn't have the flexibility to protect itself in the situation that does exist in the southwest and the midwest it is in for a hard time in the future.

I respectfully urge your Honor to approve the settlement.

THE COURT: State your name for the record,

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please.

MR. ELSEN: My name is Sheldon H. Elsen. I am an attorney for plaintiff Betty Levin, and under the order of this Court, together with other counsel who have addressed the Court this morning for the Class B stockholders.

Your Honor, I will first address myself briefly to the one or two points about the litigation which arose during Mr. Pomerantz' talk and then I will address myself specifically to the objections raised in Mr. Garfield's affidavit and generally I will attempt to articulate not only for the Court, but for other minority B stockholders who are present today the relationship between attorneys independent of Alleghany in the negotiations and the role of Alleghany because that seems to have been raised in a number of objections.

First, on the question of the evidence both with respect to the common law cause of action for dividends and the 10-B(5) claim, we did have a good deal of evidence. Your Honor raised the question about statements denigrating the stock. We had not only extensive depositions, but they were taken on the basis of statements made by officers of the company to the New York Society of Security Analysts, the St. Louis Society of Security Analysts, stockholders' meetings, newspaper clippings. We had statements in support which

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were part of the preparation for what we called the freeze out, the plan stopped by the Supreme Court, in which there was express recognition of the relationship between the low dividend policy and the value of the shares which Mississippi desired to eliminate.

I have great confidence on the liability aspect of this case, on both causes of action. The 10-B cause of action, your Honor, however, raises really quite similar problems of remedy which are like other different problems of remedy.

The reason for the 10-B(5), of course, is because the law in this Circuit, the Genasco case, and the like, which would give injunctive relief, seem to be the law and still seem to be the law which we must consider at this time.

And we believe that we come before this Court on a demand for equitable relief of an extraordinarily complex nature.

Now, this settlement, your Honor, with $850 in cash -- and, as I say, the parties do not characterize these in their papers -- but if one considers this against past years' dividends that more than $30 per share of each class B stock, for which we have been getting $5, for each year since 1964 when the B first became eligible for

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dividends.

It did not become eligible until the A received $5.

That happened in 1964. For every year thereafter it was $850 which gives the equivalent of more than $80 per share.

Secondly, your Honor, the railroad has agreed, and this was a bargain for representation, that after the 16 for one split on the shares that they will expect to pay no less than $5 a share on each of the new shares which is the equivalent of $80 on the old shares, subject, of course, to unforeseen business conditions. Not only is there that representation, your Honor, but the availability of the recapitalization --

THE COURT: That means that a class B shareholder as against the $5 he has been receiving up to now would be getting $80 a share.

MR. ELSEN: Correct, plus for all the years going back to '64.

THE COURT: I am talking perspectively.

MR. ELSEN: Yes, your Honor. Not only is this provided for by representation but the recapitalization provides the economic basis to implement such a new dividend policy.

Mississippi will have an equal percentage approximately but it's almost to the point -- approximately 62 per cent of the new common as well as the new preferred. They have to invest $40 million of their own money in the new common and the thought that Mississippi would then have a conflict of interest under which they were deprived the new holders, successors to the B, this conflict would not exist under the circumstances.

The problem has been the conflicts. The recapitalization eliminates the conflict instead of giving Mississippi the incentive to deprive the B. It gives Mississippi an incentive to treat both classes fairly or at least equally. These are crucial aspects of the settlement.

In addition, there are features of the settlement, your Honor, which are not available by judicial remedy at all.

For example, the class B stock to date has been very hard to market. It's traded. There are only 40,000 shares. It's traded over the counter.

The spread between the bid and the ask is considerable. The price ranges from anywhere to 1000, 1200, 1500. It's down to 500 sometimes. Those are large multiples and with big spreads in a thin market it's very hard for

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someone who wants to sell his stock or buy more stock to do it.

Under the split there will be over 600,000 shares. They are to be selling in the general range of $100, give or take 10, $20, and they are to be listed on the New York Stock Exchange or at the appropriate exchange, barring of course some unforeseen change in the appropriate listing facilities.

THE COURT: What you are saying is that the new stock, as far as the B stock owners are concerned, will be a readily marketable stock where as now it isn't. In fact, that was one of the complaints that you made. It was not marketable.

MR. ELSEN: That is indeed so. Of course, your Honor, we ourselves show in the complaint to illustrate the conflict of interest -- we have not asked the Court to exercise its equitable jurisdiction on this question of the unmarketability even though we recognize the impossibility of using judicial remedy to solve everything. We would not ask you to order a split of the stock.

Maybe we might have, but I think that we would probably not. The problems of remedy were extraordinary. The problems that Mr. Pomerantz has said, the problems of dealing with the future were very difficult and wasteful

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and expensive. Settlement has the great advantage of resolving these problems.

I want to say about the question of the role of Alleghany versus the minority, there has been reference to that in Mr.Garfield's papers. There has been rather blunt and direct charges made by some other stockholders in their letters and I think that they are entitled to an answer.

Some of what I am about to say is, of course, well known to the Court but I would like to make a public statement for those stockholders who have raised this question. The action has proceeded as a class action under order of Judge Bryan. It has been run by three firms, Alleghany counsel, Messrs. Donovan, Leisure, Newton & Irvine have been one of them but the action, not only this action but the voting rights actions were commenced by independent counsel who had no relation whatsoever to Alleghany.

The lawyers, I believe, have attempted in the litigation to use the most economic forms of pooling their resources and expertise in this field and Alleghany has advanced rather considerable sums but there has been at no point any neglect of the interest of any member of the class.

I say this not only because there has been wholly independent counsel -- Messrs. Pomerantz, Lowenthal

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and myself -- but because counsel for Alleghany have been aware of their fiduciary duties in this class action. The negotiations were eventually three way.

The minority of the class could not have access to what I think could be fairly called an extraordinarily favorable type of settlement using the recap device without the concurrence of the majority stockholder of the class. He just had to have a favorable class vote. We could not do anything but proceed to judgment and to obtain dividends without the concurrence of Alleghany.

At the same time Alleghany and Mississippi and the defendants could not settle this lawsuit over reasonable objections by the minority. I think that all counsel were, throughout this case, quite sensitive to this matter. The negotiations were not only Alleghany, Mississippi, they were Alleghany with us and then, of course, as we really began to make progress and come down to the part when the parties were ready to talk business Mr. Pomerantz and I became increasingly involved as well as Mr. Lowenthal and our associates and participated extensively.

We were quite concerned during those negotiations with the distinctive problems of the minority even though, of course, we were counsel for the class under the orders of the Court.

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But during these negotiations I think we had to bear with the business realities of the situation.

As I saw the situation and as it became clear to us Mississippi required that Alleghany be bought out and if Alleghany was to be bought out there was no all stock deal. We would have liked an all stock deal. It has advantages.

We would have had a tax relief free organization and then stockholders could have traded in the stock, with the new stock, once the split had come. But nobody was about to give us an all stock deal. It did not resolve the conflict of interest between the classes.

It left Alleghany as a large stockholder. Alleghany didn't want one, Mississippi didn't want one and were in no position, as Mr. Garfield suggests, to sit there and pound on the table.

Of course, we could have gone ahead and litigated and said "We want an all stock deal, therefore, we will drag this matter through the courts until you give us one." That would not, in my judgment, your Honor, have been a responsible course of action.

The settlement which is proposed is far more favorable to the class than anything that we think we could have accomplished in that fashion and, indeed, your Honor,

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I am constrained to observe that had we pressed this Court to afford a judicial remedy of dividends we would have had all ordinary income.

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THE COURT: And all of it is taxable.

MR. ELSEN: Every penny is taxable. To have taken that course, your Honor, would have been not only self-defeating but I do not believe it would have been a compliance with our responsibilities under the order of this Court.

Finally, your Honor, we are aware throughout these discussions of the point that Mr. Walton put so well earlier that we would all be better off settling this lawsuit. My attention has been called by defense counsel to a very recent statement of Standard & Poors which is very favorable under prospects of this railroad now that the recapitalization appears to be forthcoming, at least so Standard & Poors read it because it will open the railroad to economic activity which its present class bars.

On the question of book value, which Mr. Garfield goes into in some depth, I would like to make these observations: First of all, I take it that Mr. Garfield's point is essentially this: There will be a new class of preferred stock which will be convertible into the new common and it will also be callable. Upon the conversion

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or upon such a call the book value which theoretically might belong to the B although one may argue that some of it belongs to the A as a cushion for its preferential dividend, but passing the question of a cushion, Mr. Garfield I believe argues that the book value would then be spread throughout the class of common and there will be reduction in the book value allocable to the class B and to the new common stock, the successor to the B.

The first observation, your Honor, is that in a situation of this sort one cannot have everything. The values of the settlement are extraordinary, they are high. They mean money. They mean dividend. They mean money coming from the future. They mean prosperity for the railroad.

If the price is what Mr. Garfield says and we do not quarrel with his arithmetic or his calculations except his not leaving any cushion for the A and I would quarrel with that except that I don't think that that is my particular function at this point, but even then it's just a very small price for values of this magnitude, a very small price.

Secondly, a memorandum has been filed with the Court on behalf of all parties citing leading authorities in this field, the classic text being Graham and the like,

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all of which say that in the railroad book value is the least consequential condition of value.

One may ask, and I believe that some minority stockholders probably are asking themselves in good faith and reasonably, how is it if book value means so little, how is it that United States Supreme Court makes such a point of book value in talking about its famous four rabbits for a horse?

Well, your Honor, I will say that the question that the Court had to face -- and I think your Honor has indeed touched on this point earlier in analyzing this. The question the Court had to decide there was whether there should be a class vote. A one for one exchange without a class vote certainly would seem to be an extraordinary change in the values of the two classes.

There was no arm's length bargaining figure of 24.50 based on capitalized earnings before the United States Supreme Court. We hadn't reached that. No one sat down and tried to set it up.

But the Court can look at book value and you can see that there was a gross discrepancy, enough to deal with the issue that was before the Court. Here we have not a one for one situation, we have, I think, very roughly -- I may characterize it as a 24-1/2 for one situation,

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quite a difference.

And here we have a value based on capitalized earnings arrived at by hard arm's length bargaining by sophisticated experts. The Supreme Court had to decide whether the plan should go back but by implication they also had to look at the best available indicium but they did not have to decide what was the correct ratio.

That was what we had to do during the negotiations. I am quite persuaded not only by our work before but also by the papers on file before the Court, the papers of Mr. Jones and of other persons, as well as all the experts that we have consulted that this exchange ratio is a fair one.

I will say one thing in response to one remark made by Mr. Garfield at the end of his affidavit.

THE COURT: The requested fees is no assurance of the fairness of the stttlement is what he said. He doesn't have confidence in it simply by reason of the substance or the amount of the requested fees.

MR. ELSEN: Right. I find this, as I think any counsel who values his integrity, as I think the Court knows I do, a painful matter to have to even speak on.

THE COURT: I can assuage your pain about it because I will not pay much attention to it. I don't think it's a significant remark in terms of the issues

in the case.

MR. ELSEN: I will say in addition to representing to the Court that this played absolutely no bearing whatsoever in our representation of the class, I think Mr. Garfield might observe that counsel, and I speak of my co-counsel also who have carried a case for nine years without any compensation whatsoever and through ever type of court and litigation, are not the kind of lawyers who jump at the first offer that comes along and say "Let's go inand settle."

We have had no agreement on fees. I do want to point out one thing to your Honor that I think is of importance to the matters that are before us.

THE COURT: If I may hear other counsel who are in favor of this plan I must ask you, you are running much beyond your time.

MR. ELSEN: The last remark is this, your Honor: In agreement as to who is to pay the fee is of importance to the settlement because a stockholder who is to vote on the recapitalization will know that he is to receive a net figure. The agreement that the railroad and Mississippi will pay the fees is a positive plus for the class because unlike the usual class action where counsel will apply for a fee from the fund, because there is a

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recapitalization in this situation, stockholders will receive a net fee and the fund will be increased by the amount of the fees.

I think that that is indeed a plus but that is why there had to be an agreement as to that aspect.

THE COURT: Who else wants to be heard in favor of the proposed settlement?

MR. WILLIS: My name is Everett I. Willis, Dewey, Ballantine.

THE COURT: You represent Mississippi?

MR. WILLIS: Yes, the holder of the majority of the Class A stock

I can pretty much throw away the notes of what I had planned to say and to try and concentrate on one or two questions your Honor raised in the course of the other presentations.

We are not here to try the case, of course. The papers on both sides set forth our respective views of the strength and weaknesses. Mr. Pomerantz very frankly admitted that they had great difficulties and, of course, as shown in our papers, we think their difficulties were even more formidable than they realized. Mr. Pomerantz recgonizes that in order to sustain a contention that the Missouri Pacific board did not exercise independent honest

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judgment in deciding on dividends you can't show that by just showing that Mississippi had a majority of the Class A stock or just by showing that there was lots of money in the railroad and the dividend was $5 and calling it a pittance.

There was no direct evidence to support any contention that Mississippi influenced the decisions on dividends or anything else or that the Missouri Pacific board did not do its job of exercising an honest, independent judgment in deciding what dividends the railroad could prudently pay and were good for all the stockholders.

t4/3 Now, your Honor, at this point I believe your Honor asked Mr. Pomerantz, during his presentation, what the direct evidence was and Mr. Pomerantz said that I would touch on that,and I will.

We had extensive depositions of Mr. Jenks, the chief executive officer of the railroad, and of Mississippi, Mr. Craft, the chief financial officer of the railroad and of Mr. T.C. Davis, who is a director of Missouri Pacific and has never had any position with Mississippi at all. And they dealt at great length with what the dividend declaring process was in the Missouri Pacific.

In the first place, before it ever got to the board they had a finance committee which developed all kinds

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of statistics and figures and went over it and reached recommendations to make to the board and then before each board meeting there was a very substantial folder given to each director, usually in advance of the meeting so he could study it and it had all kinds of pertinent data and statistics on this railroad and on the industry. And they would have debtor meetings often, even before the formal board meeting and go over it.

They would show, for example, the earnings of the railroad, apparent and anticipated, the prospective earnings. They would have extensive studies of the cash flow and the cash available to the railroad. They would show the sources of funds, the earnings, the source from depreciation and then the board would consider, of course, the needs for the railroad.

This is a railroad with a very heavy debt and debt service is a very big item and acquiring their bonds in the market was thought to be a good step and it was difficult to reduce this heavy debt structure. They had the matter of acquisitions to think about.

As Mr. Jenks shows in his affidavit, due to this very roadblock of the two classes of stock they are unable to merge as ordinary railroads would and they have to follow the cash route, indeed anybody that might otherwise

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like to consider a merger with them when they realize that it would just precipitate a long litigation between two classes of stock -- one saying we are being robbed, we want more, as the B stock had done. They are not interested.

So a great need for cash has been acquisitions in that way and for cash and they did acquire. They acquired the Alton and Southern jointly with the Chicago and Northwestern. They acquired the KO&G, the CNEI, the Missouri and Illinois, the Texas & Pacific --

THE COURT: These were all through stock acquisitions?

MR. WILLIS: Cash, buying the stock.

THE COURT: In other words, what you are saying is that the cash that the plaintiffs claim was available for the declaration of dividends was used in part to acquire stock in other railroads because of the problem that had been created via the merger route?

MR. WILLIS: Yes, sir, and to keep this railroad from being encircled. If everybody merges all around you -- in this day and age I think it's common knowledge -- a railroad has got to be able to seize merger opportunities or wither on the vine.

Your Honor mentioned the Sante Fe. They invested $33 million in securities for Sante Fe and had hoped to

be able to eventually have a merger with the Santa Fe but it never eventuated. Then, of course, they have heavy capital expenditures. They have got to keep replacing the fleet of cars. They have got to keep their railroad and tie in good order. They have to have good yards. They have got to satisfy the needs of the road. They have got to take care of the maintenance and there was a great deal of diverse maintenance when this road came out of bankruptcy.

They have to take into account the spiralling cost, spiralling wage costs, inflation and statistics on all those things were in this big folder that went before the board and they considered and these directors pointed out that usually even those folders didn't contain everything that had to be considered.

Directors wouldthink of other things and they sat down and they said "What do we need for the railroad and what can we prudently pay in dividends," and then they made the decision.

The testimony on that was extensive and that is the way it was done. Mr. Pomerantz again was very frank in conceding that during most of this period, and that includes the year '64 when the $5 dividend they complained of was first

declared. This board wasn't a majority of Mississippi people. It was a board of strong outside independent directors that did their job and, by the way, the dividend payout to both classes of stock since 1964 in each year has approximated 67 per cent of the income in the corporation available.

THE COURT: The Class B stock answer to that is you have to break the percentages down. If you broke the perdentage down it went to A stock as against that that went to B stock thatthere is a disparity. You have totalled the percentage.

MR WALTON: Thank you, your Honor.

MR. WILLIS: The A stock had to get $5 in their one million nine shares.

THE COURT: Mr. Willis, what that adds up to is that your defense essentially to the stockholder suit, and we must bear in mind that we are considering a proposed settlement in terms of a suit, is that the business judgment of the directors whose actions are challenged was that these available funds were more required in terms of the welfare of the corporation than they would be by distribution of the income to the Class B stock and the declaration of the dividend.

They exercised a normal business judgment to

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preserve the basic structure of the company as a going railroad company.

MR. WILLIS: That is right. They did what they thought was prudent. They didn't want to be another Penn Central.

That is a very brief summary of the deposition testimony which was very extensive.

THE COURT: The Court will want to read that testimony and I have already asked that a memorandum be submitted to me pointing out where the witnesses testified because I think that all counsel will recognize that that would have been a prime issue in the case, certainly under the first cause of action. Essentially the suit was brought to compel the declaration of dividends. The plaintiffs claim that they were improperly withheld. The defendants say that there was a business justification for not declaring the dividends.

In that circumstance I think it's important for the Court to review the testimony on that subject.

MR. WILLIS: Very well, sir.

I think I can be more brief about this but your Honor inquired of Mr. Walton about the aspect of the settlement that involves the tender offer by Mississippi and Alleghany's agreement to tender all of its stock.

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That is a very important element of this settlement and it's a very important contribution that my client, Mississippi, is making.

This common stock to which the tender offer will relate won't even exist probably for certainly months, maybe a year after the agreement was signed and Mississippi is going on the line for $40 million committed to invest in that stock with all the market and economic risks that any commitment like that made so long in advance involves.

The tender is to all alike, all the B holders and if they are going -- Mississippi is committed to a minimum of 400,000 shares. If more is tendered then Mississippi wishes to buy it. It will be prorated among all of them. But this is very important in the first place as Mr. Walton said was the case, we had understood that Alleghany wanted to get out of the stock and into cash.

Of course, Mississippi wanted to end up with control.

THE COURT: You want Alleghany out of the picture too, don't you?

MR. WILLIS: We want control. It's very important because the root cause of all the trouble of this litigation and the many litigations that I am sure would follow if this isn't settled is the divided control, the

A stock electing the board and whenever an important merger decision comes through the B stock saying "We won't play ball until we get what we want."

Mississippi is going on the line for $40 million and this is important because it achieves something this litigation could never achieve. It lets this railroad go about its business, find available mergers and take other steps that it has just been hamstrung and unable to take under this situation.

I would like just to say a word to what the others have said about the negotiations. This case, of course, hs been pending for five years. It started in 1967. Our firm came in a little after it started. We came in in 1969 for Mississippi and we were told that efforts to solve this problem and break this log jam had been going on for ten years. We tried and I participated personally at a lot of the negotiating sessions.

I just can't count how many suggestions were batted up on one side and rejected by the other and both sides confident of their strength that nobody was willing to give a millimeter at times. And the lawyers tried and the principals tried and the lawyers and the principals together would try and the lawyers again and finally lightning struck in October of 1972 and they reached agreement.

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But it was the kind of settlement negotiations, hard nosed fighting between two opposing interests, both convinced of the rectitude of their positions and its the kind of negotiations that could hardly fail to produce a fair and reasonable settlement without too much give or too much take on eitherside.

There is one element of the settlement, I must say, that I hope works out and I think it will. We have a tight time schedule. This agreement is terminable by any party if it is not consummated by December 31st, 1973. Standing here on January 25th that may sound like a lot of time but it is a tight time schedule, if there ever was one, when we consider that we have to get through the SEC with proxy materials and then get proxy materials out, have a stockholders' meeting and then nobody can predict how long the ICC will take and have to go all through and get their approval of the issuance of the new securities and we have to race the clock.

But I think if we all stick to our knitting and keep plugging every day that we will make it. Incidentally, I think that in addition to the bitter hard fought negotiations between opposing interests we have further assurances of fairness here in the settlement in that it cannot be consummated unless an unusually large percentage of the

stockholders approve, 75 per cent of each class, and as you know that has to include a majority of the minority in each class and the securities to be issued under the plan have to pass muster with the ICC.

Maybe no settlement is perfect for everybody, your Honor, but when you compare the expense, the time, the diversic of executive time and the real fruitlessness of this litigation and the fact that it really wouldn't solve the principal problem whereas this settlement does, I think this comes close to being perfect when compared with the futility of the litigation.

I think we really have the reverse of that old cliche about a bad settlement being better than a good lawsuit. I think we have a good lawsuit and that sure is better than a bad lawsuit.

THE COURT: Is there anybody else to be heard in favor?

MR. PECK: My name is David W. Peck, your Honor. Very briefly, I represent Missouri Pacific Railroad, the corpus which is being fought over.

I am not going to retrace any of the ground that has been covered or to give any indication to the extent I associate or do not associate myself with anything that has been said. I think as far as the merits of the settle-

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ment are concerned in fairness, it is sufficiently demonstrated in the affidavits from Mr. Jenks, Mr. Jones, and from myself to satisfy the Court. I, therefore, would just like to touch on certain obvious facts here which are internal guarantees of the fairness of the settlement and of the integrity of the settlement.

As has been said and which I can certainly vouch for, this settlement is the result of long, arduous negotiations between the two parties, primarily in interest in the A and B stock, Alleghany and Mississippi River, and participants have been the principals quite as much as the lawyers.

But the railroad itself has been separately and independently represented.

THE COURT: You represented the railroad and you have been an active participant in all the negotiations?

MR. PECK: I have. I have participated and I think discharged an independent position aimed both at getting this matter settled in the interest of both A and B stockholders and their common company and in having a settlement that is a fair settlement between the A and B stockholders. Not only have I had that position and that obligation, which I think I have discharged, not only by contributing something I think I can say to keeping

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everybody negotiating here because from the very start of this case, as your Honor I think will perhaps remember from your own first contact with it, counsel told you as they told several judges of the court and in pretrial matters that recognizing that this litigation was not going to get at the root of the trouble or solve much of any, whichever way that it went, that they were addressing themselves to the root cause of the trouble, the division between the stockholders and try to work out something which would be a reconciliation of the differences and amelioration of their divisions so that both A and B people would, in common, truly have a common interest in their common company.

I have kept, to the best of my ability, everybody talking and participated myself very deeply and then there is just one other thing that I want to emphasize in that connection. Your Honor has been informed and you have observed that during most of the time here the Missouri Pacific board has had a majority of independent directors. I have been in touch with these directors during the course of this litigation. They have made it perfectly clear to me their independence and have made it perfectly clear to me that my obligation is one of independence.

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And when the settlement came before the board of Missouri Pacific for approval, all of the directors who voted upon it were independent directors.

THE COURT: I read that in the papers that the directors who were also directors of Mississippi didn't attend the meeting and others didn't vote at the meeting.

MR. PECK: So I think that you have in the participation on both sides of well-informed, highly interested and entirely responsible and knowledgeable people with real muscle, that with them on each side and with the independence that there has been in the middle, both as to the directors of the railroad and their counsel, that you have something that, if not conclusive, is certainly a very strong indication of objectivity, realism.

And I think I can say in summing it all up that while, of course, you could have discussions of a settlement here go on for as many years as they have been going on more, you could have a hundred people with a hundred different ideas as to what would be fair, fairer or fairest, but I don't think that it is the province or the burden of the Court to try to devise a settlement when the only question before it is, is this one a fair - and which is the only apparent disposition possible ever to bring about a conclusion of controversy and a prejudice forever

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to this railroad.

And I submit that this settlement is so clearly, I think, fair and to be preferred over the only alternative of a continuation of frutless litigation that when all is considered by your Honor, I think the only conclusion that can be reached is that this settlement should be approved.

I would say only one word more, following up what Mr. Willis said to you about a tight timetable here, which is very tight, indeed, and I would trust that in giving time for any of counsel, including those associated in any way with me in putting in anything more, that that will be very soon so that we can get this submitted to you without delay.

My partner Mr. Maney thinks that I should mention to your Honor in response to one of the objections here that it has not been disclosed how the-- what is going to be the source of the payment of counsel fees that your Honor may direct here.

It has been said that it is to be paid by the railroad and by Mississippi River. And while I thought it had been mentioned, I want to make it perfectly clear that the understanding is that they will participate evenly in assuming that responsibility. Or, as an alternative, anything that your Honor might otherwise think was fair.

So your Honor will have a chance to pass upon that as well as on the attorneys' fee question generally, which of course is not involved here at all and I don't want to get into it.

Thank you.

THE COURT: Now, have I heard everybody who desires to speak in favor of the proposed settlement?

I will hear those opposed.

I will start with you, Mr. Garfield. Please bear the time limit in mind.

MR. GARFIELD: Yes, I will do my best, your Honor.

My name is Edward Garfield of the firm of Greenbaum, Wolff & Ernst, who opposed this settlement on behalf of the Class B stockholders Edward Garfield and Barbara M. Garfield.

If your Honor please, what I hope to show is that this settlement is not fair and reasonable to the Class B stockholders.

I first want to point out that all of these great improvements to this railroad have come out of earnings that belong to the Class B stockholders, some 350 million dollars of retained earnings.

THE COURT: I suppose if there were no improvements

made, if the rolling stock was not kept at a maximum efficiency, and if the railroad didn't meet competitive situations, there would be no earnings.

Doesn't that follow?

MR. GARFIELD: I agree with your Honor, that follows, and I would even add to that that there is created great potential for future earnings, because this is a very fine railroad.

That is not the question in this case at all. The question is whether the settlement is fair to the Class B stockholders, not whether--

THE COURT: I understand, that comes back to the question that I indicated which really requires me to go over the depositions.

Essentially the sint is for the purpose of declaring dividends in favor of Class B stock which the plaintiff asserts had been improperly withheld, and the defense is that the distribution was not made because it was important in the interest and the welfare of the corporation to use the available funds for the purpose of maintaining the efficiency and protecting itself against competitors.

MR. GARFIELD: I understand that, your Honor, and I am not questioning that at all. I wish to say that

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I associate myself with the remarks made by Mr.Pomerantz and Mr. Elsen as to the merits of the lawsuit.

However, this is a settlement of a lawsuit and the question I am addressing myself to is, is it a fair settlement to the Class B stockholders.

Now,first I want to point out that I have been charged in my affidavit with having said that the Class B stock should be valued on the basis of book value.

I have never said any such thing. And my brief makes it perfectly clear I am making no such claim.

The primary basis for valuing the stock is the capitalized earnings of the Class B shares. And the question of book value is relevant only for two purposes: It has some bearing on value, especially since I have just observed that the retained earnings went into making this an excellent railroad with great future potential, but more importantly, we must look at book value for the purpose of determining the releative equity in the company of the Class B shares and the Class A shares. And that is what my affidavit does.

Now, not one person that you have heard today has mentioned that.

Now, the B's equity-- and this railroad, according to the balance sheet as at December 31, 1971 --was

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61-1/2 percent. This recapitulation plan reduces it to 25-1/2 percent. A's equity as of that date was 38-1/2 percent. This recapitulation plan increases it to 74-1/2 percent.

Now, I think that is unfair.

THE COURT: Are the present A shareholders getting share for share?

MR. GARFIELD: They are getting share for share.

THE COURT: It's a convertible share?

MR. GARFIELD: It's a convertible share. I treat it the same as new common, because it's convertible and it almost certainly will be converted into new common.

I want to come to the question of capitalized earnings of the Class B shares. Now, I put figures as to earnings in my affidavit. Those figures have not been questioned in any way. My arithmetic has been conceded to be correct.

Now, the question is, is this Class B stock on that basis worth $4,450 a share, as I show, or is it only worth $2,450 a share, as Messrs. Burns and Jones contend. That is the real question.

THE COURT: They don't say it's worth $2,450 a share. They figure that is what the value would be based on the proposed settlement.

MR. GARFIELD: No. If your Honor pleases, with due deference, they try to justify the proposed settlement upon the

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ground that the present value of the stock is only about $2,450 a share.

THE COURT: What figure do you get, $4,400?

MR. GARFIELD: Yes.

THE COURT: Of course, again, that is different from the $7,500 or $7,600 that the Supreme Court referred to.

MR. GARFIELD: That is book value, they are talking about book value.

THE COURT: Yours is based on earnings?

MR. GARFIELD: This is based solely on earnings, your Honor. What I did is very simple. Maybe I am too simple a sole, maybe I am not sophisticated. I heard that word used a lot today. Perhaps I am not, but what I did was very simple.

I took the total earning for the railroad, I deducted the Class A dividend of nine million some hundred thousands of dollars. That happens at the same time to be the earnings of the Class A, because that is the maximum the Class A is entitled to under the charter. I got the difference, I divided that by the number of Class B shares and I got $455 per share for the Class B.

I then took a price earnings ratio of ten to one, I multiplied it and I got $4,550.

THE COURT: Suppose you took what would you

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get?

MR. GARFIELD: Well, then you would get four thousand, I don't know, something between four thousand and $4,450. Mr. Burns used his almost ten percent in his final analysis of the capitalized earnings, slightly less than ten percent. I took ten percent. I think it's proper. I am not going to argue whether it should be ten percent or nine point eight percent- I think that is a small difference.

THE COURT: Well, Mr. Garfield, if the action goes ahead and assuming that the plaintiffs should overcome what are admitted obstacles and succeed, and assuming further that the Court would have sufficient expertise to decree what dividends should have been paid from 1964 on, we take the figure of $80 a year just out of the wind and each plaintiff for each share of his Class B stock recovers, say, $800, that would have to be subject to ordinary income tax, wouldn't it?

MR. GARFIELD: Undoubtedly, your Honor, but that overlooks the fact, your Honor, that that would just be a settlement of a suit for dividends. It does not involve a recapitulation claim.

THE COURT: And you think that would be more preferable?

MR. GARFIELD: Much more. I think the recapitulation plan is far more preferable. I am all for it. All I want is

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a proper one, a fair one.

THE COURT: Mississippi has stated that as far as its concerned -- and I must acceptits word that it will not pay any more than it has indicated -- that this has been an arms' length transaction where they have sat on one side of the table and very worthy litigants and adversaries on the other side, and if you don't accept this offer we are ready to go to the mat.

MR. GARFIELD: I know they say that.

THE COURT: You think that is more preferable?

MR. GARFIELD: No, I didn't say that. I just don't think it will happen, your Honor. I heard that many, many times before.

THE COURT: I have to say yea or nay to this thing. You know, I don't enter into negotiations.

MR. GARFIELD: I understand that, your Honor. I understand that, but I think Mississippi and Mopac are just as anxious to settle this case as Class B stockholders are and I think there is a balance -- if you will excuse me, your Honor -- there is a balance of power here.

On the one hand Class A controls the management of the company. On the other hand, Class B exercises a veto power over any merger or any other form or recapitalization and also owns 61-1/2 percent of the equity. Now, that is a balance of

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power and something has to give.

THE COURT: That is exactly what every lawyer who has participated in these negotiations has contended as almost an insoluble situation which ought to be ended and if it isn't ended ultimately the theory is, at least it's been expressed, that the railroad will suffer economically, that it cannot stand up against the competition of companies which are merging one after the other and which incidentally reflects national policy today, on the theory that mergers not only lend to great efficiency of operation, but greater safety.

MR. GARFIELD: That is perfectly true, your Honor.

THE COURT: And you are suggesting if I should reject accept the settlement on your theory, if I find that it is unfair, that litigation is more desirable.

MR. GARFIELD: You will never persuade me that litigation is more desirable, but I think that in this case the matter will be settled on a more equitable basis and nothing more will change my mind on that. I see all the elements that require a settlement here, but on a fairer basis. It's not fair now.

THE COURT: I understand what you are saying.

MR. GARFIELD: And I would like to contribute to it.

THE COURT: If You would allow me to finish --

MR. GARFIELD: Excuse me.

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THE COURT: What you are saying is you believe that the plaintiffs' attorneys and the executives of these corporations, who I understand played a very important role, just as much as the attorneys did, as well as experts that were called, have not reached the maximum that is achievable as far as the settlement is concerned?

MR. GARFIELD: That is what I believe, your Honor.

THE COURT: And consequently, you think it's unfair?

MR. GARFIELD: That's right. I think it's unfair in and of itself, it's unfair on its face, your Honor.

THE COURT: I think you must agree with me, I do not have the power to negotiate this settlement. I don't believe it's the Court's function here. I think that the parties having negotiated at arms' length and presented this offer of settlement, I either decide after a review of all the present factors that it is a fair and reasonable settlement or it is not a fair and reasonable settlement.

MR. GARFIELD: That is all right. I can't expect your Honor to do anything else.

THE COURT: The lawyers may sit down and negotiate, but I do not consider it this Court's function, because of the pressure of other functions which are so great, I don't see how this Court can participate in an informed and intelligent way in negotiations of this kind without spending

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less time on other judicial matters that are pending.

MR. GARFIELD: I would like to address myself, if I may, to these alleged methods of determining the present value of the Class B stock on the basis of capitalized earnings that were followed by Mr. Burns and Mr. Jones, both of whom have been described as sophisticated experts.

Now, what they did was to take the market value -- first of all, they said -- they took all of the arnings of the railroad and they tried to find the capitalized earnings value of the entire railroad, not of the Class B stock. Then they allocated a portion of those capitalized earnings to the Class A.

How did they do that? Not by the Class A's percentage of the equity or anything like that, but by taking the market value of the Class A stock immediately prior to the first announcement of this settlemet and the market value was then $70 or $75 a share, in that range. Then they said that if you apply the same multiple to that as you would to the whole company and you deduct that, then you only leave $100 to $120 to the Class B.

Now, of course, the market value of the Class A has absolutely nothing to do with the value of the Class B and we are not trying to value the railroad on the basis of market value; we are trying to value the Class B on the basis

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of capitalized earnings and the market value of the Class A was 14 times or 15 times earnings.

What were the earnings? The earnings were $5 a share on the Class A. That was the maximum they could get. Now, it's in effect the preferred stock. The dividend on that preferred stock is covered by earnings of approximately three times. So as a preferred stock it looks pretty good. At $70 with a $5 dividend, that is a $7 yield.

THE COURT: Seven percent yield.

MR. GARFIELD: Excuse me, seven percent yeild. The Class A controls the management of Mopac, it has growth possibilities in the sense that it's in a position to get a favorable recap plan that will increase its position vis-a-vis that class of Class B.

It's also in a favorable position barring a recap to have a post-merger. All these are considerations -- more than considerations -- contributing to the price of $70 or $75 a share, but it has nothing to do, nothing whatever to do with the value of Class B stock. You can't add that value on the market for those reasons and then take it away from Class B. That is what they have done, and they come in and say, "See, it's only worth $2,450, that is what we are getting in the settlement."

Now, I repeat, I am not sophisticated, I am simple,

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and that sounds to me too sophisticated. It's wrong, and I think this Court will recognize it is wrong. It is absolutely untenable.

I will skip the point. Not too much has been made on that. I think someone remarked at least in the papers that the market value of Class B was only $1,600 a share prior to the announcement of the settlement. That is true, but why?

THE COURT: That is one of the complaints that is made here.

MR. GARFIELD: If you suppress from the public and from even the financial analysts how much the Class B shares are earning per share, which they have done for years, they even up until 1967 when I wrote a letter to the SEC -- they attributed all of the earnings from the Class A and that is what always was published -- and then they won't ever refuse.

I wrote to them time and again and they refused to publish in their annual report the earnings of the Class B stock. They simply didn't deny them. You don't see anything in the papers to that effect.

How can the public properly evaluate a stock? On top of that, the over-the-counter market is so thin, if you buy two shares of that stock or sell two shares, it greatly affects the market price. I know. I have done it. I have owned the stock since 1966 and I know what this market is.

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THE COURT: Somebody said it was a very thinly traded stock.

MR. GARFIELD: It's so thin, your Honor, and it's so easy -- I mean, if anybody were to manipulate this market, there would be nothing to it.

THE COURT: How can anybody have absolute certainty of judgment as to the value of the stock, as is being set up here? I made a reference before to the situation of the Penn Central. People were almost dogmatic when they fixed the value of the stock of the Penn Central that was being turned over to the bondholders of the New York-New Haven. As I mentioned from the time that the merger went through to the date of inclusion, there was a very substantial difference and there were experts there, too, giving their view as to the value of the stock.

You can't have absolute judgment about these matters.

MR. GARFIELD: No.

THE COURT: There are many factors over which none of the parties have control, economic or otherwise.

MR. GARFIELD: But, Your Honor, I am taking them at their own word. They say capitalized earnings are the proper method. I agree. I am taking them at their word. I am even taking the price earnings ratio, but what I say is that it has

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to be applied to the earnings of the Class B. You can't take the earnings from the Class B and apply to a much lower figure and then say, "See, it comes to $2,450; this justifies a settlement." That is what they have done here. There is no question about it. That is what they have done.

I mean, they are lifting themselves by their own bootstraps. They deprive the Class B of its dividend and then they use that as an excuse and they give the Class A the benefit in a sense and then they build up the value of the Class A and take it away from the Class B and that is the way they lift themselves up by their bootstraps.

Now, the other important point is -- I am not going to cover them all here, but I just want to hit the high spots here. I have already said about the equity, the reduction of 61-1/2 percent for Class B to 25-1/2 percent and the increase in equity for A from 38 to 74-1/2 percent.

Now, the tax consequences of this settlement. Now, we can only draw inferences from facts. I can't perform an autopsy on the mind of Alleghany, but the fact is that when you take $850 in cash, Alleghany paid them 7.2 percent income tax, whereas individual Class B stockholders who have a substantial earned income can get in to a bracket on this unearned income, this dividend, of between 70 and 80 percent.

THE COURT: Yes, but they say they made a good faith

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effort to meet that problem as far as the Class B minority stockholders were concerned when the original agreement contained provisions that instead of the $850 and 16-share setup, that the B minority stockholders had the option of getting 24-1/2 shares. But this presented not only a tax problem, but an additional tax problem where there was a risk of the entire 24-1/2 shares being considered as normal income and taxable at normal income tax rates as against only the $850 being taxed at normal income tax rates, with the two thirds of the remainder being untaxable. How do you meet that?

MR. GARFIELD: Very simply, your Honor. Originally it was an option, but why not -- I mean, aside from the number of shares, why not make it all a tax free exchange, have 24-1/2 shares.

THE COURT: I asked that question. You heard the answer.

MR. GARFIELD: But it wasn't a correct answer, your Honor. If it were 24 1/2 shares, then Mississippi would still have 53 percent of the stock under the recap, which is more than enough for control.

THE COURT: I think it's more than that as I read the papers here. There is a history -- it hasn't been litigated altogether, where what you refered to is the veto power principally of Alleghany, because of the provision in the B

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stock and in essence Mississippi has said they want Alleghany off its back in this case, and the only way it could be done is by the method they suggested, plus the suggestion that Alleghany is desireous of obtaining cash.

You have to remember, you are dealing with negotiations here, it can't be letterhead hurried.

MR. GARFIELD: I heard the attorneys for Alleghany say they didn't care about the cash. That is what they said here today. But they would just as soon have the stock.

Now, if Mississippi River isn't satisfied to have Alleghany have any kind of a stock position here at all, all they have to do is buy more of the stock. That is all. Of course, they have to expend money for it, but if they don't think 53 percent control would be sufficient, if there were 24-1/2 shares of stock instead of 16 plus $850 in cash, Mississippi would still own 53 percent of all the stock instead of 63 percent of the Class A. They would still have control, and it wouldn't make any difference to alleghany. At least, so they say.

Now, I just want to point out another thing about this tax consequence. If Alleghany takes this deal the way it is proposed --

THE COURT: On the tax consequence, you can't change the Federal tax structure to accommodate itself to this

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particular case. The taxes are what they are. Congress has decided what they are.

MR. GARFIELD: It may be, but the tax consequences are a fact of contemporary business life, they must be taken into consideration.

THE COURT: That's right, but you are complaining apparently of the fact that Alleghany because of its position as the railroad and its ownership of other corporations will ultimately not pay as heavy a tax as the individual stockholders. Well, this is a matter of Congressional law.

MR. GARFIELD: I have a point to make, your Honor. If instead of having this kind of a setup, part stock and part cash, Alleghany got stock alone and sold it so they had a capital gain, they would be subject to a 30 percent capital gains tax and the result would be that they would net about 50 million dollars.

I figured it all out on the basis of their tax base of 26 million. But if they do it this way, they have left 51 million dollars, a little more than 51 million. Now, all I am saying is that as far as Alleghany is concerned, unless they are trying to get this extra edge of a million some hundred thousand dollars, they might just as well take all stock.

(Continued on next page.)

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THE COURT: But, Mr. Garfield, what do you do with the risk that counsel has stated is inherent in a settlement where the B stockholders get 24 and a half shares of the 24 and a half shares being subject to normal income tax?

MR. GARFIELD: Oh, there wouldn't - if it were just a tax-free exchange with no cash -- I think what counsel was trying to say, your Honor, if I may rephrase it, if you had 850 dollars in cash or the option to take 8 and a half shares then not only would that be disallowed, but you would jeopardize the balance of the 16 shares. That could be treated as income, too, perhaps, they are saying, they are not sure.

THE COURT: I think you are right.

MR. ELSEN: Excuse me, your Honor, so I leave nothing out, it would jeopardize a substantial portion of the remaining 16 shares. I would not want to suggest the entire, but a substantial portion.

MR. GARFIELD: Now, much has been said here about "Well, you have to get a 75 per cent vote of Class B stockholders of which the minority of Class B must vote by the majority and then you have to have the approval of the ICC and so forth.

I don't think that goes before your Honor. Your

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Honor has to decide whether it is a fair--

THE COURT: You don't have to state that to me.

MR. GARFIELD: If your Honor approves--

THE COURT: It is either fair or unfair. I have to decide.

MR. GARFIELD: And the stockholders would go by what your Honor says.

THE COURT: I don't know if they will.

MR. GARFIELD: Well, I will make book with it.

THE COURT: All right, Mr. Garfield, you have gone a little over your time. I think you said everything you want to say.

MR. GARFIELD: I think more or less. I said the rest of it in my brief.

THE COURT: I went over your papers, too.

MR. GARFIELD: Thank you.

THE COURT: Now, I believe there is some other opposing stockholder who wanted to be heard.

Mr.Garfield, you stated in your affidavit, as I recall it, how many shares you owned. I think you own some and your wife.

MR.GARFIELD: Yes, I own 35 and my wife owns 15.

THE COURT: Anybody else wants to be heard in opposition? Mr. Cohen?

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MR. COHEN: Yes, your Honor.

THE COURT: You represent, I think --

MR. GARFIELD: If your Honor please, I just want to add that if your Honor should disapprove the settlement, I would want an opportunity to intervene as a plaintiff in the action for the purpose of participating in the settlement negotiations.

THE COURT: All right.

MR. COHEN: Your Honor, my name is Cohen.

THE COURT: Before you go ahead, Mr. Cohen, you said for the purpose of participating in the settlement negotiations.

If I should disapprove of the settlement as not being a fair and reasonable one, I am telling you now that I am setting the case down for trial. I had set this case down for early December as I recall it and it showed the amount of time counsel indicated would be required for trial. I believe it is three or four weeks.

If I adhere to your position, the case will be set down for trial. The case has been set down for a long, long time.

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MR. GARFIELD: All right. That is what we will do. We have trial lawyers in the firm too, your Honor.

MR. COHEN: Your Honor, my name is Michael Cohen. I represent Jacob Ira and June Cohen, of Chicago, joint owners of 50 shares of Class A stock.

THE COURT: How long have they owned the stock?

MR. COHEN: They have owned it since '69.

In view of the fact that I am not licensed to practice in New York, though I am licensed to practice in Illinois, I would like to move the Court for leave to appear before this Court and to be notified of all future proceedings in this matter.

THE COURT: If you file an appearance you will be notified.

MR. COHEN: I filed an appearance --

THE COURT: The appearance will have to be filed by local attorneys. That is required under our rules.

We are not going to change the rules for you.

MR. COHEN: I wasn't aware of that, and that will be done, your Honor. Thank you.

As Mr. Walton indicated, my primary objection to the settlement is the inadequacy of the notice. We contend that a notice has to be more than just a notice of the time and place of the hearing. Many of the stockholders, of course,

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live far from New York and could not come in. I feel that it's important that the notice set forth sufficient facts to allow them to make an intelligent decision whether they should conceivably come to New York to object for this settlement.

For the following reasons I do feel that the notice is inadequate on these grounds.

The first thing is that the notice fails to indicate the nature of the derivative action brought by the plaintiffs and the reason for its dismissal. None of the facts elicited in the discovery proceedings are disclosed so that the shareholders -- they can't determine whether there is a reasonable possibility of success if the complaint was litigated.

Further, the notice fails to disclose any consideration for the dismissal of the derivative defendants. The settlement also fails to indicate the basis for the agreement of the Missouri Pacific Railroad Company not to oppose the application of Alleghany for the $850,000 in attorneys' fees and expenses.

The implementation of the settlement may result in the payment of as much as $33,771,350, according to a news release. The notice fails to disclose the fact of such payment on the financial structure of the Missouri Pacific

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Railroad and the additional financing costs of its operations which may result from the pay-out of all that cash.

I think that basically summarizes what I would like to say. In addition, in closing, I would also like to add that I realize that the issue of attorneys' fees is not before you now, but it is the position of these objectors that no payment of fees or expenses may be made by the Missouri Pacific Railroad in excess of amounts incurred by the plaintiff which bear a direct relationship to the pecuniary benefits, if any, derived from the Missouri Pacific Railroad from the lawsuit.

I relate to the allegations of the complaint and were not necessitated by the conduct of the Mississippi River Corporation nor the individual defendants described in the complaints, and I feel that the settlement agreed should so provide.

Thank you, your Honor.

THE COURT: Is there any objectant who desires to be heard?

Step forward, please.

Would you state your name and the number of shares that you own and how long?

MR. POLANCAER: My name is Merrill Polancaer; I own 5 shares of Missouri Pacific B, and my wife also owns

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5 shares. I have owned them since May of '59, and my wife since July of '56. She originally bought the old stold and got the reverse split.

I also own 200 shares of Alleghany in my own name since January 1967. I previously wrote a letter --

THE COURT: I have your letter.

MR. POLANCAER: Outlining the points I wanted to cover. In the late afternoon mail yesterday I received a whole copy of affidavits and papers from Donovan Leisure. Mr. Walton sent them to me. I didn't have time to consider them completely, but some of my questions have been answered there, and again today.

However, my main point, and I have written out the whole thing, and I will skip those which I feel have been covered already; I believe that Alleghany Corporation would carry through its negotiations concerning litigation and, therefore, I retain ownership with the expectation that I will receive substantially more for my shares than I could receive in the open market, even though the market for Mopac stock, to my knowledge, was at one time at least as high as $2500 a share.

THE COURT: Mopac Class B stock?

MR. POLANCAER: Yes. Over a period of years Alleghany Corporation in its annual and quarterly reports to

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shareholders made reference to Mopac on many occasions, and I quote from some of the reports:

"Alleghany Corporation in its report of the annual meeting of shareholders dated April 28, 1967, contains statements by Charles T. Ireland, Jr., who was president of Alleghany at that time, on the subject of Mopac, among other words, he stated if the 20 years reorganization of that railroad system seemed interminable, it was because Alleghany had the will and the energy to fight for the recognition of all the stockholders."

Then further on it stated:

"This corporation has fought and won many battles to protect and preserve the rights and interests of common stockholders of Missouri Pacific. Needless to say, any future challenge to these rights will be met with at least the same vigor and tenacity which Alleghany has shown in the past."

In that same report in the general discussions period and in response to a question as to whether Alleghany could realize the $6600 per share book value of Mopac B by selling it on the market, Mr. Ireland stated: "That he could not imagine Alleghany wanting to sell the stock."

In the Alleghany Corporation semi-annual report of June 30, 1968, on Page 11, under the heading of Invest-

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ments and Corporate Securities, the following appears:

"Missouri Pacific Railroad Capital Stock Class B, cost, $26,127,999, less reserve of $23082 and some odd dollars, given a cost at which they carried it on their books as $3,045,200."

Then in the next column it has indicated market, $51,882,500. That was for 20,753, and being a CPA I had no difficulty in dividing that out. It came to an even $25 per share. That was the indicated market that they used on that statement.

Skipping to the April 28, 1972, report of the annual meeting of shareholders is the following shareholder shift which asks how the corporation in its annual report arrived at a book value of $8300 per share of Class B of Mopac in view of a market price of approximately $1200 per share.

The answer was the figure is based upon the shareowners' equity as shown on the Mopac consolidated balance sheet.

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One more quote I want to put in. In the Alleghany Corporation report for '71, on Page 4, almost a full page appears under the heading of Missouri Pacific and over the signature of F.M. Kirby, Chairman of the Board and President. One sentence: "The equity of the Class B stock in the

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consolidated system is estimated to be $8342 per share as of the end of 1971."

The last paragraph reads as follows: "Your management declines to speculate as to the outcome of such possible negotiations."

He was referring to the negotiations in this case.

"Should they take place we shall enter and then hopefully by our hope tempered by history of recent frustrations in the long years of dogged determination required on the part of Alleghany, which almost a generation ago saved the investment of the holders of the old common stock of Mopac from being wiped out, Alleghany and other Class B stockholders will continue to pursue the dividend litigation in an effort to correct this continuing injustice."

Because of the above quotations and others contained in other Alleghany reports it was with surprise, disappointment and anger that I learned that the present proposed settlement was agreed to by Alleghany.

I note further from the notice received from this Court that Alleghany has signed the agreement on behalf of the Class B shareholders, but the other two plaintiffs, Betty Levin and Robert LaVasseur, have not signed.

Can it be that they also are not satisfied with this settlement?

I raised the point about the Alleghany being barred

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from buying more stock in the future. My purpose in raising that point was to prevent any possibility of Alleghany, for example, having enough money and stepping in to buy Mississippi River stock and taking control by that route.

Therefore, I feel they should be barred from buying any of that stock. The limitation on litigations have been covered by some of the eminent attorneys who mentioned that before. I feel that if by chance I decided I want -- in view of all that has been said in various statements of Alleghany -- if as a stockholder I want to bring an action, I want to feel free to do so.

As far as the fees, I ask for an apportionment, and, I believe I had an answer. I am a little hard of hearing, as to whether Mopac and Mississippi -- who is going to pay as between those two companies, because of the fact if I wind up with Missouri Pacific stock the value of it is going to be affected to some slight extent, depending on the size of the fees that are awarded.

I have a whole paragraph here on the tax consequences of the proposed settlement. I have heard a lot of discussion on it, and I will skip what I read on it, because I raised the same points, excepting that I feel that in the notice to the shareholders that it should be thoroughly pointed out, because they each have a vote, and I assume that

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the proxy notice will have all that information in it.

I also raised the possibility, and it's none of my concern, perhaps, but the Class A shareholders are getting a new type of preferred stock with different terms than they presently have, such as cumulatives versus non-cumulatives, callable in December of '75, and their dividend restrictions may be changed.

They may have a little tax problem.

That covers my written report.

If I may make one further comment --

THE COURT: Have you filed that written statement with the Court?

MR. POLANCAER: I am leaving it.

THE COURT: Have you served these on the attorneys?

MR. POLANCAER: I will do that.

One other point. I heard a lot of talk about the fact that book value is not of importance here in the settlement. We all know that in most companies book value is substantially lower than the actual value of assets, because substantial assets -- and I am sure it holds true with Missouri Pacific -- were purchased many, many years ago, such as land, right-of-ways, and so forth, which have appreciated substantially in value and, secondly, because of depreciation normally taken on substantial assets the book

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value of those assets usually is much lower than the actual physical value of those assets.

I thank you.

THE COURT: Anybody else who wants to be heard?

MR. WOLFF: My name is Wolff. I am representing myself and my wife. We each own five shares. We have owned them since 1968.

THE COURT: What is your first name, Mr. Wolff?

MR. WOLFF: Eugene Wolff.

I would like to address myself to several questions brought up this morning.

The value of the Mopac A shares is $5 preferred. Current interest rates and the quality of earnings or the time coverage of those earnings would dictate the market price of the A stock, not the assets.

Secondly, the question of illiquidity of the approximately 40,000 shares of the B stock, that problem could be readily resolved if they had possibly 100 for 1 split, or something of that sort, which would then permit listing on the Big Board.

Thirdly, if the earnings of Missouri Pacific are $450 a share, the average price earnings ratio of the number of railroads in the U. S. varies between 10 and 20. Some are more than that.

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They are published daily, and unfortunately, I don't have today's New York Times or yesterday's Wall Street Journal to show you, but I will either bring a copy in or you can look in the paper where they are published daily. This would be a frame of reference.

For example, I know Burlington Northern is around 23 times earnings, Southern Pacific is around 12 or 13. Santa Fe is in that order of magnitude. Union Pacific is higher. Southern Railroad is higher too.

But assuming somewhere between 10 and 20, then based on earnings the price value for a share would be $4500 to $9000.

I think that that would seem to be fair, plus, I think there should be some compensation for past dividends where other railroads pay out somewheres between 50 and 75 per cent of their earnings.

The B shareholders have only had to pay out about one per cent of earnings over the years.

I haven't heard anyone mention anything about the true value of the railroad in terms of land, mineral assets. I think that should be considered in the valuation.

In terms of control, I am not concerned as to who really wants to control or run the railroad. I think they are the best people involved. But if the A shareholders are only

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involved or their concern is not with the assets but with the $5 preferred dividend, then possibly the B shareholders should be the party in control where they own the assets.

I would suggest that if the A shares are worth $70, based upon the quality of earnings, and the $5 dividend, then if you were to say that the B shares would receive a $5 dividend too, you get 16 B shares worth approximately $70 in the market, if the same valuation were presumed, plus the $850 in cash, which would give you a total of $1970.

I suggest that both parties not the Court reconsider their arm's length discussions and evaluate the exchange at a much more fairer value than the 2450.

Thank you.

THE COURT: Anybody else?

MR. WESSON: Your Honor, I am William R. Wesson.

belt 3 I am a stock broker at the firm of Coggeshall & Hicks, at 611 Arnold Avenue, Point Pleasant Beach, New Jersey.

THE COURT: How many shares do you own?

MR. WESSON: My family and I own 220.

THE COURT: How long have you owned them?

MR. WESSON: We started purchasing in '61, and I think we stopped two or three years ago. We ran out of money.

I speak for myself, for my family, for friends and

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clients.

THE COURT: Are you an attorney?

MR. WESSON: No, sir. I am a stock broker, and I am speaking in the capacity of trying to plead protection for their interest.

I will read my remarks, because I know your time is limited.

We objected to the settlement in this action, for it is just another round in the effort by Mississippi River Corporation to transfer a large portion of the B shareholders equity ownership of the Missouri Pacific Railroad, Mopac, to its own accounts, which effort Supreme Court Justice William O. Douglas has described as "one of the most notorious pieces of predatory finance I've ever seen," 1967, 386 U.S. 162.

Continuing reference to that case, plaintiff Alleghany points out in its complaint in the present action that after remand by the United States Supreme Court, the District Court, Eastern District of Missouri, Judge Meredith found on January 12, 1968, that the aforesaid scheme was inherently unfair to the Class B shareholders, and "would have taken from the B stockholders an equity in excess of $200 million, and given it to the A stockholders."

In juxtaposition, it is puzzling to note that this

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present plan proposes to transfer the A shares $187.6 million in stockholder equity belonging to the B shares.

If we consider other values cited below, the proposed plan transfers far in excess of $200 million of property value to the A shares from the B shares.

Why did Allegheny reverse its position by approving the new plan?

The plan proposes to change the A shares from a non-equity instrument entitled to $100 per share in liquitation to an equity-bearing share with a $201 approximate book value. This is calculated by using approximate shareholders equity at December 31, 1972, less $33,771,350, to be paid to the B shareholders.

The plan will change the relative equity standing of the A and B shares with respect to approximate shareholders equity at December 31, 1972, as follows:

The A will be 74.6 after the plan. It is 34.8 now.

The B will change, but go down from 65 to 25. That is 65.2 to 25.4.

THE COURT: How do you reach that figure on distribution now that the A stock is limited, as I understand it, to $100? How do you get to that figure?

MR. WESSON: You take the equity. This is --

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to do it before your Honor. You take the equity which we calculate at the end of 12/31/72, which has not been published yet. This is an approximate equity that I worked out from the 1971 annual report and from Mr. Marburry's statement that they earned $27 million in this past year.

I am sorry, that is Mr. Jenks' statement.

We multiply $100 times the A shares, 1,864,050. We get 186,405,00. Subtract, and you get 348,936,085, which belongs to the B shares; and these are only standard and par book values. From that you divide the 535 million into the 186 million, and the A shares have 34.8 percent. You divide the 35 million into 348 million, and the B shares get 65.2 percent. That happens to be $8,780 a share for the B, $100 a share for the A.

After the proposed settlement you will have outstanding, and this will assume conversion of the convertible preferred, you will have the A's, who will have 1,864,052. They probably have paid some of the officers some in the meantime. We are using figures from the annual report, the last annual report.

The B will have 39,731 times 16, which is 635,696. That gives you 2,499,548. If you divide the A shares, 1,864,052 by the total shares, you get 74.6 percent.

If you divide the B shares, 635,696 by 2,499,548 you get 25.4 percent.

In the second instance you have to do it based on the shares because then all of them are the same. They all have the same standing. They are all equity shares.

The A stockholder equity will not only increase from 34.8 percent to 74.6 percent, but it's character will be changed from a fixed face value security which is being diminished daily by inflation to a dynamic equity instrument which takes from the B shares huge residual values already earned plus future prosperity and property.

In the 1954 plan of reorganization, finance docket No. 9918, the Interstate Commerce Commission indicates that as outlined by the Supreme Court, 318 U.S. 523, 565, "It is the duty of the Commission to see that each security holder in the order of his priority receives from that which is available for satisfaction of his claim the equitable equivalent of the rights surrendered," which we are surrendering our equity right.

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We want the equity back when the plan goes through. The plan in the present action does not propose equitable equivalent of the rights surrendered. It is, therefore, illegal.

Let us examine the rights which will be surrendered

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i. e., the huge residuary values of the B shares in various categories such as stockholders equity since the 1954 reorganization, the write-off at the time of the 1954 reorganization, the effects of inflation on the property and future prosperity.

Under residual earnings the stockholders' equity at December 31, 1972, amounted to approximately $349 million or $8,700 per B share.

The write-off: The write-off in the 1954 reorganization amounts to approximately $473.4 million, or $11,900 per B share.

Inflation: The Bureau of Labor Statistics Inflation Index shows the following:

In 1972, this is the latest figure they use for 100, we are taking November, 1972 as 100, 1954 at the time of the 1954 reorganization which became effective 1/1/55 for this railroad, the value of the dollar in today's terms was $1.58.

In 1933, when the railroad went into receivership, when the receivership commenced today's dollar was $3.27.

In 1917, when the railroad was incorporated, the value of today's dollar was $3.35.

THE COURT: If you are going back that far you might as well let me read that.

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Do you have much more?

MR. WESSON: No, sir.

In the year 1913, the establishment of the Federal Reserve, it was $4.27, and that is where the statistics begin. We have one date back, 1876, reorganization with Pacific Railroad, out of which this railroad came, and we don't have statistics for that, rather the Bureau of Labor Statistics does not have any.

Future prosperity: There are huge real estate and mineral right-holdings along the road's rights-of-way, sprawled across the southwest quarter of the United States, containing great, unmeasured wealth.

I am told, and I didn't put it in here, because it's hearsay, but I understand those rights-of-way are 100 square miles, every other 100 square miles belongs to us. That is what Mississippi would like to have.

From the above it can be argued that the underlying intrinsic value of each B share far exceeds $25,000.

We bought this stock -- family, friends and clients -- numbering some 68 people, relying on a contract laid down in the agreed plan of the 1954 reorganization approved by the Interstate Commerce Commission and confirmed by the Federal District Court of St. Louis, effective January 1,1955.

Thus, this plan became the law of the land. The

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plaintiffs came to this Court to plead that certain parties to the contract, the defendants have breached their fiduciary duties under the agreement to the Mopac Class B stockholders.

Now they wish to reward the defendants for this breach by transferring huge amounts of Class B property to Class A stockholders. We are puzzled and enraged.

Our United States Constitution, Article I, Section 9, states in part:

"No ex post facto law shall be passed," and Section 10, further states in part:

"No state shall pass ex post facto law or law impairing the obligation of contracts."

If the proposed plan in the present action is approved, the dissenting B stockholders will seek damages and compensation for the difference in the value of their property under the 1954 reorganization plan, and what they get under the presently proposed plan, using the above provisions of the United States Constitution and Missouri State law for relief.

We believe the Court should have provided instructions in its legal notice to stockholders dated December 20, 1972, for dissident B stockholders in the event the plan is approved.

There are provisions in the Missouri law 351.090

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which should be made known to all B stockholders by legal notice of through the Securities and Exchange Commission before the vote is taken.

This is a highly solvent corporation, in excellent condition because of the sacrifices of the B stockholders. There is no need for recapitalization. We ask for fair and equitable treatment with respect to our earnings.

There is legal precedent that a Court can enter a corporate board room and dictate dividend action, and they entered Henry Ford's corporate board room and they dictated what he could pay in dividends.

This is Dodge, et al. vs. Ford Motor Company, et al., 1919, 204 Michigan 459, and approved by the District Court 170 NW 668.

We object to this plan which is just more predatory finance on the part of powerful interests. There is a place to protest these conspiratorial actions in the criminal section of our law.

We minority B stockholders who disagree with the plan of recapitalization ask this Court for the protection of our property rights from appropriation by scheming financial interests.

This matter should go to trial.

THE COURT: Do you have a copy of your statement?

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MR. WESSON: I do.

THE COURT: There are others who want to be heard, and I want to hear others.

MR. WESSON: One further statement.

I have listened carefully to the evidence, and I would like to propose a suggestion.

Alleghany has said in this court room it wants out and wants money.

Mississippi has said in this court room it wants control. They already have control, but they would like to split the stock. They don't want to split the stock while they have B stockholders around. They have shown this over the years. They split their own stock, they didn't split our stock. Why not let Alleghany sell its 20-odd thousand shares to Mississippi for whatever they want to sell at, $2450 a share, and leave the rest of us alone, let our equity stand, because the plan in itself is illegal, in my opinion.

Thank you, sir.

THE COURT: Anybody else who wants to be heard?

How much time would you require?

MR. ENGERSOLL: About five minutes, I believe.

THE COURT: All right.

MR. ENGERSOLL: My name is Winchester F. Engersoll.

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From just a personal standpoint in the fairness of the settlement -- I own a number of different securities involved in this law suit. I have one share of Missouri Pacific Class B common, with my wife. This is in joint tenancy. I have 10 shares of Alleghany Corporation common stock in joint tenancy with my wife, 10 shares of Mississippi River Corp. at joint tenancy with my wife.

I am beneficiary, but not of record as an individual, $5,000 Missouri Pacific Company first mortgage 4-1/4 per cent bonds of 1990.

I own individually by myself of record and beneficially 50 shares of Missouri Pacific Class A.

I should like to preface my remarks by stating that the root cause of this problem here is not that the Class B stockholders are fighting the Class A stockholders but that the previous reorganization was not filed but subject to negotiations as the late Thomas E. Dewey observed himself.

I have made a few suggestions which I feel would be of benefit not only to the defendants but to the plaintiffs as well, and for that reason I would like to be classified as amicus curiae, because I think it will help you, sir, in your deliberations.

My proposed requirement is that Mississippi River

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Corporation would convert immediately to new common stock the new preferred stock it would receive in the proposed settlement which would be of help not only to the plaintiffs but also to all the defendants in that there would not be needed such a large dividend reserve to cover dividends for preferred as would be required if Mississippi River accepted the preferred stock without converting.

The dividend reserve would be something in the nature of $10 million, as presently promulgated, versus $5 million if Mississippi River Corporation converted their holding. This would free $5 million for the running of the railroad even though the same total amount of dividends were to be paid out each year.

So far as plaintiffs Levin and LeVasseur, representatives of Class B stockholders are concerned, the conversion of Mississippi River Corporation preferred stock to common stock would assure Levin and LeVasseur and other B shareholders that the defendants were not trying to beat them but had actually joined them in converting their stock.

So far as plaintiff Alleghany is concerned, it would not be so necessary for them to tender their stock, and they might actually be of assistance to Missouri Pacific by stock subscription now that the other issues seemed to be resolved.

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I have been opposed to a cumulative dividend on the Missouri Pacific Class A stock. I own 50 shares of it, and I think that merely extending them the conversion privilege would be fair enough, and under these circumstances it would actually be helpful to Mississippi River Corporation if they converted all their stock if this cumulative dividend provision was not included.

Finally, I think that the new preferred shareholders voting as a class should be entitled to elect two directors of the railroad and the new common stock should be entitled to elect thirteen.

I am optomistic, as a long-time shareholder, a number of years of many of these securities, I hope that Alleghany and Mississippi River can settle their differences and run the railroad jointly on a pooling of interest basis.

THE COURT: Is there another objectant?

How long will you be?

MR. GABRIEL: I don't want to talk, --

THE COURT: I have heard most of the argument.

Can't you submit what you have?

MR. GABRIEL: I want to present this to you because I think everybody said everything. The only thing that puzzles me is how they can distinquish the B stock when that is the guts of the corporation. It's like taking a company

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in the receivership.

THE COURT: What is your name, and how many shares do you own?

MR. GABRIEL: I am James C. Gabriel, and I own 120 shares.

MR. ELSEN: Mr. Polancaer has inquired as to signing the agreement by plaintiffs Levin and LeVasseur.

The Court is aware of this, but I would like to answer Mr. Polancaer through the Court that the settlement agreement which was negotiated as a unity is nevertheless embodied in two distinct documents.

One is the usual stipulation of settlement signed by all counsel on behalf of their clients, as well as their own recommendations to the Court.

The other is a document called a settlement agreement, signed by the three corporate parties, because the number of corporate acts are required.

But they are cross-referenced and they are all part of the same agreement.

Mrs. Levin, who owns 320 shares, some three-quarters of a million dollars worth of stock under the agreement, is in favor of the settlement, and Mr. Lowenthal and I, who in addition to our duties to the class initially were retained by some 15 per cent of the class, and I can say to

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the Court that those individuals approve of the settlement.

THE COURT: Those argeements are on file, are they not?

MR. ELSEN: Yes, the agreements are on file.

THE COURT: Who represents Mississippi?

That would be Dewey, Ballantine.

The objectants have raised -- those who appeared and also those who submitted affidavits -- a claim of change in equity position as between the present Class A and present Class B.

If you are going to submit any memorandum in response to what has been stated here today, or previously, I would like you to direct yourself to that, unless you are prepared to do it now, if it won't take too long.

You may want to reflect on it.

I have one other question to ask you. This was the point raised by Mr. Garfield, why it's not feasible to effect the plan by 24-1/2 shares instead of the $850 plus the 16, and whether or not Mississippi and the other defendants would not reconsider that?

MR. WILLIS: On the last question, the settlement has been reached -- it has 16 -- the one that was reached after all these many months of negotiations and consideration of all the alternatives, and to get the people back in

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the room and make another deal is just as unpredictable as it always has been.

THE COURT: Why isn't it feasible?

MR. WILLIS: For one thing, that would reduce, if you had 24-1/2 shares for each Class B share, that would certainly reduce the Mississippi control below the objective.

THE COURT: Isn't there a way of working that out?

I understood you to say that the control aspect was an element, but isn't there a way of putting this through on the basis of the 24-1/2 shares and at the same time legally meeting the problem of control to which you referred to and which I understand?

MR. WALTON: They wouldn't control a class and, in the second place, that would mean Alleghany would have to tender its stock. The others would be in a position of getting stock automatically. That means Alleghany gets something different from a minority. You will have a different slew or a different court room full of people getting in here saying Alleghany is not getting the same as us, they are taking advantage of us.

That is just something that we can't afford lawsuits on, on the basis that we are not getting exactly the same as every other minority holder.

THE COURT: What you are saying is that this is a

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firm and final offer of settlement?

MR. WALTON: This is the offer we want.

THE COURT: Either you take it or leave it?

MR. ELSEN: An Alleghany sale would have all the negative tax consequences that have been talked about, because this would be a substantially disproportionate reduction of class.

end take

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MR. GARFIELD: But, your Honor, what Mr. Walton said I am afraid is not so. Mississippi would in no circumstances have 53 per cent of the total stock. And Allegheny would still sell them four hundred thousand shares the same as they agreed to do now.

I don't mean four hundred, but whatever, the same number of shares as they are seeking to sell them now and the other stockholders would have the position.

In other words, Mississippi would buy four hundred thousand shares and the same way as it is now, there would be no discrepancy between Allegheny and the minority Class B stockholders, that isn't so. And it could be done and all Mississippi would have to say is, it stays with 53 per cent control instead of 63 per cent of the Class A, that is all it involves.

MR. WILLIS: It will be below 53 per cent.

MR. GARFIELD: No.

THE COURT: The reporter can't take it down simultaneously.

MR. WILLIS: Mississippi cannot control the class.

MR. WALTON: It isn't satisfactory to us, as far as I know, and I firmly believe it is not satisfactory to Mississippi and it is just another matter of the tail

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wagging the dog.

The minority wants to run the show.

THE COURT: All right.

Now, how much time--

MR. ELSEN: Your Honor, we could not accept.

MR. WALTON: I am talking about the dissenting minority.

THE COURT: How much time do you want to submit whatever additional papers you desire to submit?

MR. PECK: I suggest next Monday.

THE COURT: Mr. Garfield, any objections?

MR. GARFIELD: I couldn't possibly do it by next Monday. I have other engagements that are going to tie me up day and night from now through Monday.

THE COURT: I don't know whether I am going to get to this. I have got cases back-to-back in pending matters including a preliminary injunction hearing that will take three days.

How much time would you require?

MR. GARFIELD: Well, of course, I want to see what they are going to serve on me.

THE COURT: I am going to say it quickly; exchange affidavits by Monday, replies within three days thereafter.

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I take it everybody who desired to be heard has been heard.

All right, gentlemen, the hearing is concluded.

...

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In any case, however, this conditional privilege with regard to advisory opinions does not extend to factual reports and summaries. . . . 54 F. R.D. at 12 [Citations omitted].

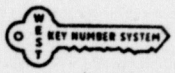
[9] Applying these guidelines to the instant case, it is clear that all of the documents specified in item 1 of Plaintiff's Motion for Order Requiring Production of Documents for Inspection and Copying (arrest reports, follow-up reports and closing reports concerning plaintiff's arrest) should be disclosed. In view of plaintiff's acquittal on the reckless driving charges filed against him,[12] it is obvious that the investigation has been completed. However, disclosure is limited to factual data. If the City believes that portions of the police reports contain evaluative summaries or recommendations that should not be discovered, the reports may be submitted to the court for *in camera* inspection prior to delivery to plaintiff.

[10] With respect to item 2 of plaintiff's Motion (reports prepared in connection with any interdepartmental investigation of the complaint filed against the Department by plaintiff), discovery will be denied at this time. Counsel for the City has stated that this investigation is not yet completed and that there is a possibility of interdepartmental disciplinary proceedings arising from the investigation. However, plaintiff may renew his motion at an appropriate time if reasonably necessary for the prosecution of his case.

[11] Item 3 of plaintiff's Motion (all documents "which relate in any way" to the arrest, detention and booking of plaintiff or to his complaint against the Department) is denied as too broad, but with leave to renew if appropriate.

Accordingly, it is the judgment of this court that (1) the City be dismissed as a party in this proceeding, and (2) that the documents specified in item 1 of plaintiff's Motion be made available for inspection and copying subject to the limitations specified above.

It is so ordered.



Betty LEVIN et al., Plaintiffs,
v.
MISSISSIPPI RIVER CORPORATION et al., Defendants.
No. 67 Civ. 5095.

United States District Court,
S. D. New York.
March 19, 1973.

Motion was filed for approval of settlement agreement in a stockholders' class and derivative action. The District Court, Edward Weinfeld, J., held, inter alia, that settlement of the action, which arose from conflict between two classes of stockholders in railroad corporation, would be approved in light of benefits to be derived by the railroad in improving its competitive position and by the plaintiff class of stockholders in securing return on their investment, and in light of analysis of the probability of success on trial; prospect that settlement would eliminate the underlying conflict, which could not be eliminated at trial; judgment of the parties, who included a majority of each class, that terms of settlement were fair; and fact that approval by a majority of the minority shareholders of each class was required by the terms of the settlement.

Settlement approved.

See, also, D.C., 47 F.R.D. 294.

1. Federal Civil Procedure ⇐1699

Function of court on application for approval of settlement of stockholders'

12. See footnote 2, *supra*.

class and derivative action was not to reopen and enter into negotiations with the litigants in the hope of improving the terms of the settlement to meet objections nor to substitute its business judgment for that of the parties, but to determine whether settlement was fair, reasonable and adequate as to the stockholder class and the corporation. Fed. Rules Civ.Proc. rules 23, 23.1, 28 U.S. C.A.

2. Federal Civil Procedure ⇐1699

Court, on application for approval of settlement of stockholders' class and derivative suit, was not to turn settlement hearing into a trial or a rehearsal of trial nor to make an actual determination of the facts and the law but to form an educated estimate of the complexity, expense and likely duration of the litigation and to compare the terms of the compromise with the likely rewards of the litigation. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

3. Federal Civil Procedure ⇐1699

Settlement of stockholders' class and derivative action, which arose from conflict between two classes of stockholders in railroad corporation, would be approved in light of benefits to be derived by the railroad in improving its competitive position and by the plaintiff class of stockholders in securing return on their investment, and in light of analysis of the probability of success on trial; prospect that settlement would eliminate the underlying conflict, which could not be eliminated at trial; judgment of the parties, who included a majority of each class, that terms of settlement were fair; and fact that approval by a majority of the minority shareholders of each class was required by the terms of the settlement. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.; Interstate Commerce Act, §§ 5(2), 20a, 49 U.S. C.A. §§ 5(2), 20a.

4. Federal Civil Procedure ⇐1699

An important, if not the most important factor in determining whether to approve settlement of stockholders' class and derivative action is probability of plaintiffs' success upon trial and, if successful, the likely rewards of the litigation. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

5. Corporations ⇐320(11)

Class B shareholders had the burden of proving their claim, in class action, that corporation's board of directors, in subservience to the wishes of the majority class A shareholder, abused their discretionary powers and arbitrarily and unreasonably withheld dividends on the class B shares, though corporation's condition warranted additional dividends.

6. Corporations ⇐152

Determination of whether dividends are to be declared rests in first instance with the board of directors, and courts may intervene only when there has been bad faith, neglect or abuse of discretion; it is not sufficient for stockholders to show that substantial earnings were available to pay a higher dividend than was declared.

7. Federal Civil Procedure ⇐1699

Contention by directors, in class action by class B shareholders, that failure to declare larger dividend on class B shares was based on prudent business judgment in light of large cash expenditures needed to maintain corporation's competitive standing raised a substantial issue to be taken into account on application for approval of settlement. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

8. Corporations ⇐310(1)

Directors are permitted a very liberal discretion in determining matters of business policy, and if that discretion has been exercised in good faith, it will not be disturbed even though it may have been injudicious or though court may believe that a different policy was desirable.

9. Securities Regulation ⇐143

Class B shareholders who alleged that certain class A shareholders violated

the Securities Exchange Act by buying and selling shares of class B stock to depress the market of such stock, thereby forcing plaintiffs to sell at prices much below true value thereof, had burden of proving that defendants' actions were fraudulent or unjustified, and that such conduct in some way caused plaintiffs' injury. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

10. Federal Civil Procedure ⇐1699

Though final judgment as to fairness of proposed settlement of stockholders' class and derivative action was responsibility of court, joint recommendation of the parties, their attorneys, and their investment advisers was entitled to substantial weight, particularly where, inter alia, one of the plaintiffs was the owner of 53% of the stock in the plaintiff class and the other plaintiffs also owned substantial numbers of shares of such stock and their counsel acted independently of counsel for majority shareholder plaintiff in representing the interests of the minority shareholders. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

11. Federal Civil Procedure ⇐1699

The parties are permitted great freedom in shaping the form of settlement consideration in a stockholders' class and derivative action. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

12. Federal Civil Procedure ⇐1699

Fact that comparatively small number of holders of shares reflecting a small percentage of the total outstanding shares in the plaintiff class opposed settlement of stockholders' class and derivative action, as against a great majority who favored it, did not relieve court of its function in passing on the fairness of the proposal. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

13. Federal Civil Procedure ⇐1699

Proposed settlement of stockholders' class and derivative action, which arose from dispute between plaintiff class B shareholders and the class A shareholders, who had operating control, and which provided for an exchange of stock as part of the settlement was not shown to be unfair despite contention of objectors that value of cash and shares of common stock to be received by holders of class B stock was substantially less than the value of the shares to be surrendered and that the cash element of the exchange formula would have income tax disadvantages to the minority class B shareholders. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

14. Federal Civil Procedure ⇐1699

In passing on proposed settlement of stockholders' class and derivative action, which settlement involved recapitalization, court was not called upon to make a definitive assessment of the value of each class of stock, old or new, but to determine whether the terms of the settlement, taking into account the probabilities of success upon a trial, and all other pertinent factors, were fair, reasonable, and adequate. Fed.Rules Civ. Proc. rules 23, 23.1, 28 U.S.C.A.

15. Federal Civil Procedure ⇐1699

In passing upon proposed settlement of stockholders' class and derivative action involving a railroad corporation, the standard of "fair, reasonable and adequate" was not to be equated with the standard of "fair and equitable" applicable to a proposed railroad reorganization under the Bankruptcy Act; in the compromise of a stockholders' lawsuit, there necessarily come into play practical adjustments. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.; Bankr.Act, § 77, 11 U.S.C.A. § 205.

See publication Words and Phrases for other judicial constructions and definitions.

16. Evidence ⇐601(4)

In valuing shares of stock, the terms "equity" and "book value" are essentially synonymous.

See publication Words and Phrases for other judicial constructions and definitions.

17. Federal Civil Procedure ⇐1699

In passing upon proposed settlement of stockholders' class and derivative action, which settlement involved a recapitalization, book value was of little significance in appraising the value of stock to be surrendered by the plaintiff class. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

18. Federal Civil Procedure ⇐1699

For purposes of valuing stock in connection with proposed recapitalization as part of a settlement of stockholders' class and derivative action, market evaluation of stock may reflect a more realistic appraisal of its value than a conceptual evaluation; theory must yield to the reality of the market place.

19. Federal Civil Procedure ⇐1699

Contention of class B stockholders who opposed settlement of stockholders' class and derivative action, which involved recapitalization, that the market price of their stock had been depressed by the acts of the defendants did not preclude consideration of such market price in determining the fairness of the settlement since the consequence of defendants' alleged conduct was one of the issues which would have to be decided were the case to go to trial. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

20. Federal Civil Procedure ⇐1699

When court is called upon to decide whether settlement reached by litigants in stockholders' class and derivative action is fair and reasonable, question of whether rejection of alternative proposals by one or another of the parties was justified is not before the court. Fed. Rules Civ.Proc. rules 23, 23.1, 28 U.S. C.A.

21. Federal Civil Procedure ⇐1698

Notice of proposed settlement of stockholders' class and derivative action, which was mailed to each registered stockholder and published in national business newspaper, and which informed interested stockholders of the nature of the pending action, the general terms of the settlement, that complete and detailed information was available from the files of the court, and that any stockholder could appear and be heard, was sufficient. Fed.Rules Civ.Proc. rules 23, 23.1, 28 U.S.C.A.

Orans, Elsen & Polstein, Pomerantz, Levy, Haudek & Block, New York City, for plaintiffs Levin and LeVasseur; Sheldon H. Elsen, Abraham L. Pomerantz, John Lowenthal, William E. Haudek, Lewis Shapiro, New York City, of counsel.

Donovan, Leisure Newton & Irvine, New York City, for plaintiff Alleghany Corporation; John E. Tobin, M. Lauck Walton, Theodore E. Somerville, Glenn S. Koppel, New York City, of counsel.

Dewey, Ballantine, Bushby, Palmer & Wood, New York City, for defendant Mississippi River Corp.; Everett I. Willis, Robert S. Wolf, Gerald E. Ross, New York City, of counsel.

Sullivan & Cromwell, New York City, for defendants Missouri Pac. R. Co., Robert H. Craft, T. C. Davis and Thomas F. Milbank; David W. Peck, Michael M. Maney, Carroll E. Neesemann, New York City, of counsel.

Greenbaum, Wolff & Ernst, New York City, for Class B Objectors Edward Garfield and Barbara M. Garfield; Barron M. Tenny, Edward Garfield, New York City, of counsel.

Sixteen Other Class B Objectors, pro se.

Michael Paul Cohen, Chicago, Ill., for Class A Objectors Jacob R. Cohen and June Cohen.

EDWARD WEINFELD, District Judge.

This is a motion pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure for approval of a settlement agreement of a class action brought on behalf of Class B stockholders of the Missouri Pacific Railroad Company

(MoPac), an interstate railroad. The plaintiffs in the class action are Alleghany Corporation (Alleghany), the owner of a majority of the outstanding shares of Class B stock, and two individual owners of such stock, Betty Levin (Levin) and Robert LeVasseur (LeVasseur), who also assert derivative claims on behalf of and in the right of MoPac. The defendants include Mississippi River Corporation (Mississippi), the owner of a majority of the outstanding Class A stock of MoPac, and three individual defendants, directors of MoPac, two of whom are also directors of Mississippi. In the event the proposed settlement is approved, applications for allowance of attorneys' fees and expenses are to be considered following entry of final judgment.

HISTORICAL BACKGROUND OF THE CLASS A AND CLASS B STOCK

The capitalization of MoPac has been the subject of controversy and litigation for almost forty years. The Class A and Class B stockholders have been at odds over their respective rights and interests over a substantial period. Their differences were accentuated by MoPac's restructured capitalization when in 1956 it emerged from reorganization proceedings filed in 1933. During those twenty-three years various proposed plans of reorganization failed to gain acceptance. Alleghany Corporation, the owner of about half of MoPac's then outstanding common stock, had opposed reorganization plans proposed in 1940, 1944 and 1949 because none provided for the old common stockholders. Finally, a fourth plan, referred to as an "Agreed System Plan," was proposed by the reorganization Trustee, approved by the Interstate Commerce Commission in 1954, accepted by Alleghany and other interests, and became effective March 1, 1956.[1] The plan, which then seemed to be an ingenious way to compose differences among various security and equity interests, contained provisions which some objectors predicted "are sure to cause trouble."[2] And so it has come to pass. The equity interests have been at odds and in litigation ever since.

MoPac's recapitalization upon its reorganization was structured so that the old preferred and common stock were replaced by two classes of stock, Class A and Class B. The Class A shares of the reorganized company were issued to the former preferred stockholders of MoPac, the debtor, with each share entitled to receive, when and as declared by the Board of Directors, noncumulative dividends, not to exceed $5 annually, and in the event of dissolution or liquidation, the first $100, together with any dividends declared and unpaid. The Class B shares were issued to the former common stockholders of the debtor, and after payment of the $5 dividend to the Class A stock, each share of Class B stock is entitled to receive dividends, without restriction, as the Board of Directors may

1. Missouri Pac. R. R. Reorganization, 290 I.C.C. 477 (1954), approved in In re Missouri Pac. R. R., 129 F.Supp. 392 (E.D.Mo.), aff'd sub nom. Missouri Pac. R. R. 5¼% S.S.B.C. v. Thompson, 225 F.2d 761 (8th Cir. 1955), cert. denied, 350 U.S. 959, 76 S.Ct. 347, 100 L.Ed. 833 (1956).

2. In re Missouri Pac. R. R., 129 F.Supp. 392, 397 (E.D.Mo.1955). ICC Commissioner Mahaffie was the first to predict trouble ahead. In his reluctant concurrence of the reorganization plan, he said:

> "The prior class 'A' stock is limited as to dividends and is noncumulative. It will be largely of a speculative character for some years at best. But the 'B' stock is for the present, and for the foreseeable future, principally valuable as a token for speculation. Consequently, its relation to the 'A' stock and to the debentures and income bonds which precede it is reasonably sure to cause trouble."

Missouri Pac. R. R. Reorganization, 290 I.C.C. 477, 624–25 (1954)

declare, and upon liquidation or dissolution of MoPac, the equity in excess of the Class A preferences. Each share of each class is entitled to one vote. The former preferred stockholders received approximately 1.9 million shares and the former common stockholders received approximately 40,000 shares, so that 98% of the voting stock is held by the Class A stock and 2% by the Class B stock.

Obviously, the Class A stockholders have the power to elect MoPac's Board of Directors, as well as voting control with respect to other but not all corporate matters. On mergers, consolidations or reorganizations involving issuance of additional stock or the alteration of the rights of either class, approval by a majority of each class is required. Thus, in effect, the Class B stock has a veto power over such actions. In practical terms, the "ingenious" solution envisaged under the 1956 reorganization created a basic conflict between the two classes, with the equity ownership principally in the B stock, but with effective operating control in the A stock.

Mississippi began acquiring Class A stock in 1959 and by 1963 owned more than one million shares, constituting 58% of the outstanding Class A shares. It now owns 63%, or 1,158,395 shares out of a total outstanding of 1,864,052. Since 1963 it has elected the Board of Directors of MoPac. Alleghany, on the other hand, which has owned a majority of the outstanding Class B stock ever since it was issued upon the reorganization, now owns, subject to a voting trust, approximately 53%, or 21,243 shares, of the total outstanding 39,731 shares. Thus the disparity of interest between the two classes of stock is further aggravated by Alleghany's majority ownership of the B stock, which gives it an independent veto power over any corporate action that requires the separate approval of the B stock.

THE VOTING RIGHTS LITIGATION

The first litigation that the differing stockholders became embroiled in after the reorganization came in December 1963, when MoPac's Board of Directors proposed the consolidation of MoPac and its 83% owned subsidiary, Texas and Pacific Railway Company (T & P), into a new corporation, Texas and Missouri Pacific Railroad Company (T & M). An application was filed with the Interstate Commerce Commission for an order under section 5(2) of the Interstate Commerce Act authorizing the proposed consolidation and for the issuance of securities by T & M under section 20a of the Act. The plan provided for an exchange of each MoPac share, regardless of class, for four shares of the new corporation and for an exchange of the T & P stock (other than that owned by MoPac) on the basis of one share of T & P for 4.8 shares of the new company. MoPac's Board of Directors took the position that the Class B stockholders were not entitled to vote on the plan separately and apart from the Class A stockholders, and that it intended to submit the plan for approval to the collective vote of the Class A and Class B stockholders. In view of Mississippi's ownership of a majority of the Class A stock, as well as all outstanding stock, the outcome of the vote on consolidation was virtually foreordained. Alleghany and other Class B stockholders filed actions in the United States District Court for the Eastern District of Missouri for a declaratory judgment that the plan required the approval of a majority of each of the two classes of stock and sought other relief. Upon a limited consolidation of the cases the district court held that MoPac's Articles of Association and the applicable federal and state law required the separate approval of each class of shareholders.[3] The Court of Appeals reversed, holding that separate class ap-

3. Slayton v. Missouri Pac. R. R., 233 F.Supp. 747 (E.D.Mo.1964).

proval was not required.[4] On certiorari, the Supreme Court unanimously reversed the Court of Appeals, holding that:

> "With reference to voting rights, we hold only that in a consolidation as proposed here, Missouri law must be applied and . . . that law requires the application of the Articles of Association of Mopac, which in turn, require the assent of the majority of the shareholders on a separate class vote basis." [5]

Since a number of stockholders emphasize certain rhetorical statements in the Court's opinion,[6] it is well to bear in mind the Court's precise holding, and further its statement: "We do not . . . reach the merits of the proposed plan . . . ." [7] The Court's ruling ended the proposed consolidation when in March 1967 MoPac and T & P abandoned their plan, but further litigation was ahead.

THE INSTANT ACTION

This action was instituted by plaintiff Levin in December 1967. Thereafter Alleghany and LeVasseur intervened pursuant to leave granted by this Court. In September 1968 Judge Bryan ordered that the action be maintained as a class action on behalf of all Class B stockholders. The thrust of the complaints of all three plaintiffs is directed toward the dividend policy with respect to the Class B stock. From 1964 to 1971 the annual dividends paid on the A stock have been $5 per share. During that same period annual dividends declared and paid on the Class B stock have been $5 per share.

In substance, three separate claims are asserted against Mississippi and the three individual defendants.[8] Under the first cause of action plaintiffs claim that the dividends declared and paid by MoPac have been unreasonably low; that Mississippi has misused its majority voting stock power by causing MoPac's Board of Directors to limit dividends on the Class B stock to $5, the maximum permissible per share dividend payable on the Class A stock, despite the enormous differences in the equity value between the two classes, and notwithstanding the availability in each year of net income for increased dividends after meeting the requirements on the Class A stock.

The second cause of action charges a conspiracy by Mississippi and members of MoPac's Board of Directors to "freeze out" the Class B stockholders by improperly limiting the dividends paid on the Class B stock, making public statements denigrating the market value of the Class B stock, and attempting to appropriate the equity of the Class B stockholders through the plan of consolidation of MoPac with T & P, proposed in 1963.

The third cause of action further alleges that the various acts and conduct alleged in the second cause of action were in violation of section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5, promulgated thereunder, and of defendants' common law fiduciary duty owed the Class B stockholders. The plaintiffs seek judgment that the Court direct MoPac to pay reasonable dividends for the past years, from 1964 to 1971, to all Class B stockholders; that MoPac be directed to pay reasonable dividends on the Class B stock in the future; and to award plaintiffs their costs,

4. Mississippi River Fuel Corp. v. Slayton, 359 F.2d 106 (8th Cir. 1966).

5. Levin v. Mississippi River Fuel Corp., 386 U.S. 162, 170, 87 S.Ct. 927, 932, 17 L.Ed.2d 834 (1967).

6. *See, e. g., id.* at 169, 87 S.Ct. at 931: "The plan proposes to exchange four shares of stock of T & M for one share of MoPac Class B, which . . . is like exchanging four rabbits for one horse."

7. *Id.* at 170, 87 S.Ct. at 932.

8. Plaintiff Levin also attacks the failure of defendants to split the Class B stock or to take similar steps to improve its marketability; however, no specific relief is sought.

expenses and reasonable counsel fees incurred in the prosecution of this action.

In addition to the class action claims, Levin and LeVasseur separately assert derivative claims on behalf of MoPac. One alleges that the defendants have failed to cause MoPac to replace the Class A stock with debentures or other interest bearing securities, which would materially reduce MoPac's income tax; however, as to this derivative claim, no specific relief is sought. A further derivative claim on behalf of MoPac is for the recovery of the costs and expenses incurred by it in connection with the 1963 T & P consolidation plan and the Class B voting rights action.

The defendants in their answers have denied the material allegations of the complaints and set up affirmative defenses, including, with respect to the dividend cause of action, business justification.

With the issues thus posed, the parties engaged in extensive pretrial discovery procedures commencing in 1968. The case was assigned to this Court in midyear 1972, and after a pretrial conference the trial was scheduled to commence on December 4, 1972. As the trial date approached, the litigants had virtually completed all pretrial activities, which included depositions of parties and witnesses, as well as interrogatories propounded to one another, which in due course were answered. In addition, plaintiffs had obtained, read and evaluated approximately 10,000 pages of documents from the files of MoPac and related sources. The inspection of these documents took over ninety man-days' work by plaintiffs' counsel and additional time by an accountant and securities expert, retained specially for that purpose. It is evident that the pretrial discovery on both sides was as thorough as could be and all pertinent facts exposed by the litigants in preparation for a contested trial. While engaged in concluding their expanded pretrial activities, the parties concurrently intensified efforts to effect an amicable settlement. Previously, during the pendency of this case, and even before, attempts to reach an accommodation had failed. The renewed extended negotiations were participated in not only by the lawyers representing the parties, executives and financial officers of the corporations involved, but also by independent financial analysts and investment advisers specializing in corporate and transportation finance. The negotiators recognized that central to a lasting resolution of the conflict between the two stockholder interests was the elimination of the underlying cause of the strife, a result not obtainable whatever the final outcome were the case to proceed to trial, and it was this concept which led to a settlement on the basis of a restructed capitalization.

THE TERMS OF THE PROPOSED SETTLEMENT

If the settlement is approved by the Court, a Plan of Recapitalization (Plan) and a proposed Amendment to MoPac's Articles of Association are to be submitted to stockholders for their approval, to bring about the following:

(1) each share of Class A stock would be converted into one share of $5 cumulative preferred stock, with a liquidating preference of $100 per share, convertible into one share of new common after one year following ICC authorization of the issuance of new securities and redeemable at the option of MoPac for $100 per share, after December 31, 19[illegible]. This would require the issuance of 1,864,052 shares of the new stock to the present holders of the Class A stock, of which Mississippi would be entitled to receive 1,158,395 shares;

(2) each share of Class B stock would be converted into sixteen shares of new common stock and $850 cash. This would require the issuance of 635,696 shares of new common stock to the present holders of Class B stock, of which Alleghany would be entitled to receive 329,-

888 shares; this would require a cash payment by MoPac of $33,771,350;

(3) both preferred stock and common stock would have one vote per share;

(4) the Plan and amendment would have to be approved by 75% of the outstanding shares of each class of MoPac stock, including a majority of the shares of each class other than those held by Mississippi and Alleghany—that is, a majority of the minority stockholders of each class;

(5) the issuance of the new shares would have to be approved by the Interstate Commerce Commission;

(6) upon such approvals, Mississippi is required to make a cash tender offer to all Class B stockholders for at least 400,000 shares (approximately 63%) of the new common stock, at $100 per share, and Alleghany (but not the minority B shareholders) must tender all its new common stock (339,888 shares). If more than 400,000 shares are tendered, Mississippi may purchase the shares on a pro rata basis; this would require a cash payment by Mississippi of at least $40,000,000;

(7) all claims asserted in this action and any other claims against the defendants which are based upon or arise from any of the matters alleged in the complaints, regardless of the legal theory upon which they are based, will be dismissed with prejudice;

(8) fees awarded to plaintiffs' attorneys will be paid by MoPac and Mississippi.

If the recapitalization and tender offer are not consummated by December 31, 1973, the settlement agreement would be terminable at the option of Alleghany, Mississippi or MoPac.

EVALUATION OF THE SETTLEMENT

[1, 2] The function of the Court on this application for approval of the settlement is not, as some objectors suggested at the hearing and others have since urged in their communications to the Court, to reopen and enter into negotiations with the litigants in the hope of improving the terms of the settlement to meet their respective objections; nor is the Court called upon to substitute its business judgment for that of the parties who worked out the settlement.[9] So, too, the Court is cautioned not to turn the settlement hearing into a trial or a rehearsal of a trial.[10] To do so would defeat the very purpose of the compromise to avoid a determination of the sharply contested issues and to dispense with expensive and wasteful litigation. The Court's role is a more "delicate one," [11] which requires a balancing of likelihoods rather than an actual determination of the facts and law in passing upon whether the proposed settlement is fair, reasonable and adequate to the Class B stockholders and MoPac.[12] This appraisal requires the Court to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and to "form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance . . . is the need to compare the terms of the compromise with the likely re-

9. Schleiff v. Chesapeake & O. Ry., 43 F.R.D. 175, 178 (S.D.N.Y.1967); Glicken v. Bradford, 35 F.R.D. 144, 151 (S.D.N.Y.1964).

10. Newman v. Stein, 464 F.2d 689, 692 (2d Cir.), cert. denied Benson v. Newman, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972).

11. *Id.* at 691; *see also* United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co., 447 F.2d 647 (7th Cir. 1971).

12. *See* Zerkle v. Cleveland-Cliffs Iron Co., 52 F.R.D. 151, 159 (S.D.N.Y.1971).

wards of litigation." [13] With that guidance, we turn to the task at hand.

[3] At the outset is the simple fact that the interests of each class of stockholders is tied up with the welfare of MoPac. Its operating efficiency and its competitive strength spell out economic success, which alone gives value to its stock, whatever the class. MoPac is in competition with a number of railroads, some of which, following trends in the industry and consistent with the congressional policy of encouraging consolidation of the nation's railroads into a limited number of systems,[14] have merged with other lines to effect economies and to improve efficiency. Other competitors are in the process of effecting consolidations. These merged, and the likely to be merged, competitors pose a potential threat to MoPac by depriving it of all but its short haul market and in other respects—as MoPac's chief executive officer states, "[it] could prove competitively ruinous." There can be little doubt that to maintain its competitive strength it is imperative that MoPac link itself with another system. Yet its efforts in this direction have been thwarted because of the disparate interests of the two classes of shareholders. Specific instances have been cited where other railroads have shied away from proposed consolidations because of the stockholders situation.

MoPac, to protect its competitive position against merged and other competing lines, has purchased through the years controlling securities of other railroads, a matter discussed hereafter. However, the stock acquisition method does not yield all the advantages of a merger. The elimination of the present capital structure with its built-in conflict between the two classes, which has foreclosed merger to date, will permit MoPac's officials to pursue merger prospects; it will also permit its officials to function full time in its interests and its stockholders—thousands upon thousands of hours have been devoted to litigation instead of to railroad operation.[15]

Another benefit favoring the settlement is that it provides the effective means for payment of greater dividends and thus meets in part the demands of plaintiffs. The Board of Directors anticipates that the annual dividend rate will be $5 per share on each class of stock to be issued under the Plan. With the Class B stockholders receiving sixteen shares new stock for their present one share (in addition to the $850 cash), the dividend return will be $80 per annum as against the current $5 per share. Mississippi, committed to the purchase of at least 400,000 shares of the new common stock (apart from such additional common stock it may own by reason of conversion of its preferred after one

13. Protective Comm. v. Anderson, 390 U.S. 414, 424–425, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968). *Accord*, Newman v. Stein, 464 F.2d 689, 692 (2d Cir.), cert. denied, Benson v. Newman, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972); Saylor v. Lindsley, 456 F.2d 896, 904 (2d Cir. 1972); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1085 (2d Cir.), cert. denied, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971). With regard to weighing the benefits of the compromise against the likely rewards of litigation, *see* Purcell v. Keane, 54 F.R.D. 455, 460 (E.D.Pa. 1972); Glicken v. Bradford, 35 F.R.D. 144, 152 (S.D.N.Y.1964). *But cf.* Norman v. McKee, 431 F.2d 769, 774 (9th Cir. 1970), cert. denied I.S.I. Corp. v. Myers, 401 U.S. 912, 91 S.Ct. 879, 27 L.Ed.2d 811 (1971).

14. *See* Penn Central Merger and N. & W. Inclusion Cases, 389 U.S. 486, 492, 88 S.Ct. 602, 19 L.Ed.2d 723 (1968); *see also* N.Y. Times, Feb. 16, 1973, at 1, col. 7.

15. *Cf.* Denicke v. Anglo Cal. Nat'l Bank, 141 F.2d 285, 288 (9th Cir.), cert. denied, 323 U.S. 739, 65 S.Ct. 44, 89 L.Ed. 592 (1944); Derdiarian v. Futterman Corp., 38 F.R.D. 178, 181 (S.D.N.Y. 1965).

year) would have an economic interest in the declaration of dividends on the new common stock.

Other advantages are evident. The conversion of the Class B stock into sixteen shares makes them more marketable and to this extent meets the derivative claim that the defendants failed to split the Class B stock, thereby broadening public interest in it. Additionally, at the present time the Class B stock elects no directors. Under cumulative voting the new common stock would have the means of representation on the Board of Directors.

[4] We next consider a, if not the, most important factor—the probability of plaintiffs' success upon a trial, and, if successful, "the likely rewards of [the] litigation." The extensive pretrial discovery conducted by the parties has exposed their respective strengths and weaknesses.[16] While each litigant professes confidence in his cause, it is with recognition of the force of a countervailing position and also, as all are aware, that "[s]tockholder litigation is notably difficult and unpredictable." [17]

[5–8] Plaintiffs have the burden of proof as to their claims. To prevail, they must establish under the allegations of their complaints that MoPac's Board of Directors, in subservience to the wishes of Mississippi, abused their discretionary powers and arbitrarily and unreasonably withheld dividends in each year, although MoPac's condition warranted such additional dividends.[18] Since the determination of whether a dividend should be declared rests in the first instance with the Board of Directors,[19] courts may intervene only when there has been bad faith, neglect or abuse of discretion.[20] This is indeed a heavy burden,[21] which plaintiffs' experienced counsel frankly acknowledge. However, they stress that in each year after payment of debt, other corporate requirements and dividends on the Class A stock, substantial earnings were available to pay a much higher dividend than $5 on the Class B stock. This by itself, however, would not carry the day for the plaintiffs. The directors who were deposed swore that the declaration of dividends in each year was based upon prudent business judgment, which took into account MoPac's current and long range needs. This basically is the defense to plaintiffs' charges. The defendants emphasize that since the merger route was foreclosed to MoPac, it was essential, in order to protect its competitive position, to purchase large blocs of securities in other railroads, which required large cash expenditures; also that cash was used or required for equipment, up to date maintenance, capital improvement programs, current and projected, as well as other purposes vital to MoPac's competitive standing. To underscore their defense of prudent business judgment, the defendants refer to MoPac's Articles

16. *Cf.* Saylor v. Lindsley, 456 F.2d 896, 901 (2d Cir. 1972); Cherner v. Transitron Electronic Corp., 221 F.Supp. 48, 51 (D.Mass.1963).

17. Zerkle v. Cleveland-Cliffs Iron Co., 52 F.R.D. 151, 159 (S.D.N.Y.1971); *cf.* Ferguson v. Birrell, 190 F.Supp. 506, 509 n. 10 (S.D.N.Y.1960), aff'd sub nom. Ferguson v. Tabah, 288 F.2d 665 (2d Cir. 1961).

18. *Cf.* Guttman v. Illinois Cent. R.R., 91 F.Supp. 285 (E.D.N.Y.1950), aff'd, 189 F.2d 927 (2d Cir.), cert. denied, 342 U.S. 867, 72 S.Ct. 107, 96 L.Ed. 652 (1951); W. Q. O'Neall Co. v. O'Neall, 108 Ind. App. 116, 25 N.E.2d 656 (1940); Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668 (1919); Walsh v. Walsh, 285 Mo. 181, 226 S.W. 236, 245 (1920); Patton v. Nicholas, 154 Tex. 385, 279 S.W.2d 848 (1955).

19. *See* Wabash Ry. v. Barclay, 280 U.S. 197, 203, 50 S.Ct. 106, 74 L.Ed. 368 (1930); *see also* New York, L. E. & W. R.R. v. Nickals, 119 U.S. 296, 307, 7 S.Ct. 209, 30 L.Ed. 363 (1886).

20. *See* Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668, 681–682 (1919); 11 W. Fletcher, Private Corporations § 5325 (rev. ed. 1971) and cases cited therein.

21. Staats v. Biograph Co., 236 F. 454, 457 (2d Cir. 1916).

of Association which give the Board of Directors broad powers to set aside reserves and make such other provisions as the Board "shall deem to be necessary or advisable for working capital, for expansion of the business of the Company . . . and for any other purpose of the Company."[22] The Court has reviewed the pretrial material on the issue of prudent business judgment and the defendants' position thereon cannot be said to be lacking in substance. In any event, it points up the issue as a substantial one to be resolved upon a trial. Plaintiffs, upon the whole case, would have the burden of establishing that the directors, notwithstanding the explanation of the factors which influenced their judgment, were in fact acting in bad faith or in an arbitrary manner. Directors are permitted a very liberal discretion in determining matters of business policy.[23] And if that discretion has been exercised in good faith, that it may have been injudicious or even if the Court believed a different policy were desirable, would not, by itself, be sufficient to sustain plaintiffs' burden.[24]

Moreover, even if plaintiffs should prevail upon the merits on the issue of additional dividends, it would not necessarily mean a total recovery. The Court would face the question of determining what would have constituted adequate dividends *in each year* during the period from 1964 through 1971—a decision requiring consideration of numerous variables, making the likelihood of substantial recovery questionable. The problem, as acknowledged by all parties, is difficult of solution. As counsel for Allegheny recognizes:

> "Thus, if a finding of wrongdoing were made, there would remain the problem of proving the amount of additional dividends which should have been paid. The effect of this difficult problem of proof on the outcome of the lawsuit might well depend upon which party was deemed to have the burden of proof. If plaintiffs were required to prove that the dividends paid by MoPac were inadequate, that burden could have remained unmet and recovery could have been denied. On the other hand, if defendants were required to prove the adequacy of the dividends paid, they might well have failed to meet that burden, and as a result plaintiffs might have won a substantial recovery."[25]

Plaintiffs' problems are further compounded since it is doubtful that the Court would retain jurisdiction, as plaintiffs request, in order to monitor the MoPac Board's future dividend policy which, initially, is the Board's responsibility. Such future judicial supervision of MoPac's dividend policy would require the Court to make complex business decisions from year to year as to amounts to be retained out of earnings in order to determine the net income

22. MoPac's Articles of Association, Article VII D(1).

23. *Cf.* Fielding v. Allen, 99 F.Supp. 137, 142 (S.D.N.Y.1951); Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668, 681–682 (1919); Park v. Grant Locomotive Works, 40 N.J.Eq. 114, 117–118, 3 A. 162, 165 (Ch.1885), aff'd, 45 N.J. Eq. 244, 19 A. 621 (Ct.Err. & App.1888); Leslie v. Lorillard, 110 N.Y. 519, 532, 18 N.E. 363, 365 (1888); Casey v. Woodruff, 49 N.Y.S.2d 625, 643 (Sup. Ct. 1944).

24. *Cf.* Taussig v. Wellington Fund, Inc., 313 F.2d 472, 479 (3d Cir.), cert. denied, 374 U.S. 806, 83 S.Ct. 1693, 10 L.Ed.2d 1031 (1963); Everett v. Phillips, 288 N.Y. 227, 43 N.E.2d 18 (1942); Bourne v. Bourne, 240 N.Y. 172, 177–178, 148 N.E. 180, 181 (1925); Gallagher v. New York Dock Co., 19 N.Y.S.2d 789, 800–801 (Sup.Ct.1940), aff'd, 263 A.D. 878, 32 N.Y.S.2d 348 (2d Dep't 1942); *see also* Briggs v. Spaulding, 141 U.S. 132, 11 S.Ct. 924, 35 L.Ed. 662 (1891); Masterson v. Pergament, 203 F.2d 315, 330 (6th Cir.), cert. denied, 346 U.S. 832, 74 S.Ct. 33, 98 L.Ed. 355 (1953).

25. Affidavit of M. Lauck Walton, Jan. 23, 1973, at 23.

available for the declaration of dividends. In end result, were the Court to retain jurisdiction, it would be required to function as MoPac's sole director in place of its duly elected Board of Directors.

Some objectors cite Dodge v. Ford Motor Co.,[26] as giving strength to plaintiffs' position. However, that court adopted the general principle against judicial intervention in corporate affairs. The *Dodge* court did conclude that plaintiffs had produced sufficient evidence to prove that the directors were running the corporation for the benefit of persons other than the stockholders and therefore justified in requiring the payment of reasonable dividends. The facts of the *Dodge* case are by no means similar to those in the instant case. Similarly, Mayflower Hotel Shareholders Protective Committee v. Mayflower Hotel Corp.,[27] merely demonstrates that the plaintiffs have alleged a valid cause of action, not necessarily a successful one.

As to the conspiracy charge—that Mississippi conspired with others by various acts and means to "freeze out" the Class B stockholders or to depress the market price of the stock—plaintiffs face perhaps an even heavier burden, since it is conceded that no tangible or direct evidence has thus far been unearthed to sustain the charge; perforce, plaintiffs would have to rely upon circumstantial evidence and urge that the fact finder draw inferences therefrom of wrongful motive and conspiratorial conduct.

[9] The third cause of action, based upon defendants' acts and conduct in connection with the alleged conspiracy to "freeze out" the B shareholders and allegedly resulting in violations of section 10(b) of the Securities Exchange Act, the rule thereunder and defendants' common law fiduciary duties, also presents problems of proof for plaintiffs. Plaintiffs here charge that during the existence of the alleged conspiracy Mississippi and the defendant T. C. Davis bought and sold shares of B stock; that the objective of the scheme was to depress the market of the B stock, thereby forcing plaintiffs to sell at prices much below their true value. Even considering the current liberalization of Rule 10b–5,[28] and that plaintiffs' position may have some support,[29] plaintiffs must carry the burden of proving that defendants' actions were fraudulent [30] or unjustified,[31] and that such conduct in some way caused plaintiffs' injury.[32] As to the latter, it is interesting to note that plaintiffs do not seek separate relief on their 10b–5 claim; instead, they urge that the damages be measured by the amount of reasonable dividends allegedly withheld by the defendants during 1964–1971. By invoking this measure of damages, plaintiffs also face the same problems already discussed as to the extent of recovery under the dividend cause of action.

As to the derivative causes of action, one claim seeks to hold Mississippi and the individual defendants accountable for the expenses incurred by MoPac in con-

26. 204 Mich. 459, 170 N.W. 668 (1919).

27. 84 U.S.App.D.C. 275, 173 F.2d 416 (1949).

28. *See, e.g.*, Affiliated Ute Citizens v. United States, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 92 S.Ct. 165, 30 L.Ed. 2d 128 (1971).

29. *See* Cochran v. Channing Corp., 211 F.Supp. 239 (S.D.N.Y.1962).

30. *See* List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.), cert. denied, 382 U.S. 811, 86 S.Ct. 23, 15 L.Ed.2d 60 (1965).

31. As to justification, the same problems will be encountered here as in the dividend cause of action.

32. *Cf.* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 12–13, 92 S.Ct. 165, 30 L.Ed.2d 128 (1971); Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540, 546 (2d Cir. 1967).

nection with the plan to consolidate MoPac with T & P, which was abandoned following the Supreme Court decision. Even were the plaintiffs to establish that the proposed consolidation was not in MoPac's interest but calculated to favor Mississippi,[33] the likelihood of recovery on this claim is diminished by the holding by the Eighth Circuit Court of Appeals that MoPac was not responsible to the plaintiffs for their legal fees and expenses in the voting rights litigation.[34] Additionally, plaintiffs would be hard put to prove that the proposed consolidation of MoPac with T & P was not a justifiable business decision by the MoPac Board. As already noted, the Supreme Court expressly disavowed that it passed upon the merits of the proposal.

To state all the foregoing, of course, is no forecast of result upon a trial. It is simply to recognize, as the principals themselves do, that the action presents many obstacles, particularly for plaintiffs, who have the burden of proof. With the defendants vehemently denying wrongful conduct, were the case to be tried, all the issues would be vigorously contested, with the outcome obviously uncertain. The probability of ultimate success at best can only be cautious prophecy.

Having examined the benefits of the settlement and the prospect of success upon a trial, other factors merit consideration. As all parties stress, were the plaintiffs to prevail upon the trial, or whatever its outcome, there would still remain the root cause of the conflict between the two classes of stockholders—the separation between equity ownership (principally in the B stock) and management control (in the A stock). And as long as it exists there will be continued hostility between the two and the potential of renewed litigation. Its elimination will be an advantage to all concerned. The settlement also provides for the elimination of Alleghany's ownership of equity stock, which Mississippi is to acquire. With Alleghany no longer an opposing force, it should mean stability in management and operation of MoPac.

[10, 11] Another factor favoring the settlement, but by no means determinative,[35] is the unanimous judgment of all the parties, their counsel and their investment analysts and advisers that its terms are eminently fair. To be sure, the final judgment as to the fairness of the proposal is the responsibility of this Court, but their joint recommendation is entitled to substantial weight,[36] particularly so in the instant case. A unique situation exists here not present in the usual stockholders' suit recommended to the courts for settlement, where ofttimes the plaintiffs representing the class own a relatively small economic interest in the corporation. Alleghany's self-interest as the owner of 53% of the Class B stock gives some assurance that it negotiated to obtain the best possible terms for that group viz-a-viz the Class A stockholders.[37] The other two plain-

33. As to the merits, the Court of Appeals for the Eighth Circuit recognized the issues in the voting rights litigation were complex and that no court had passed upon the fairness of the plan itself. Missouri Pac. R.R. v. Slayton, 407 F.2d 1078, 1082, 1083 (8th Cir.), cert. denied, Alleghany Corp. v. Missouri Pac. R.R. Co., 395 U.S. 937, 89 S.Ct. 1998, 23 L.Ed.2d 451 (1969).

34. Missouri Pac. R.R. v. Slayton, 407 F.2d 1078 (8th Cir.), cert. denied, Alleghany Corp. v. Missouri Pac. R.R., 395 U.S. 937, 89 S.Ct. 1998, 23 L.Ed.2d 451 (1969).

35. *Cf.* Cohen v. Young, 127 F.2d 721, 725 (6th Cir. 1942).

36. *See* Cannon v. Texas Gulf Sulphur Co., 55 F.R.D. 306, 316 (S.D.N.Y.1971); Percodani v. Riker-Maxson Corp., 50 F.R.D. 473, 477 (S.D.N.Y.1970); Schleiff v. Chesapeake & O. Ry., 43 F.R.D. 175, 179 (S.D.N.Y.1967); Glicken v. Bradford, 35 F.R.D. 144, 152 (S.D.N.Y.1964); Fielding v. Allen, 99 F.Supp. 137, 144 (S.D.N.Y.1951).

37. *Cf.* Cherner v. Transitron Electronic Corp., 221 F.Supp. 48, 51 (D.Mass.1963).

tiffs, minority Class B stockholders, each also owns a substantial number of shares reflecting a heavy investment in the stock. Their counsel have acted independently of Alleghany's counsel in representing the interests of the Class B minority shareholders. These three plaintiffs and their counsel over a long period have been alert to enforce the rights of Class B stockholders. The lawyers for the plaintiffs in this action also represented them in the Missouri voting rights case and, over Mississippi's strong opposition, successfully upheld the right of the Class B stockholders as a separate group to vote upon consolidations. They are particularly knowledgeable with respect to the basic facts of MoPac and the hard core issues of this litigation; they are especially experienced in this field of law. Additionally, the parties, during the course of the litigation and in the negotiations, had the benefit of the advice of experienced independent railroad investment advisers and analysts. The record leaves no room to doubt that the negotiations were conducted in good faith and at arms length, with the Class B stockholders represented by sophisticated, if not hardened, negotiators who deem the settlement the best result obtainable without a trial of the issues on the merits.[38]

Finally, the fairness of the settlement is emphasized by the provision that, despite Mississippi's and Alleghany's effective voting control by reason of their respective majority ownership of the Class A and B stock, sufficient under MoPac's charter to put through a recapitalization, the Plan cannot be effected without the approval of a majority of the other stockholders of each class[39]— in effect, acceptance of the settlement rests with them regardless of the desires of Mississippi and Alleghany.

The factors militating in favor of the settlement are indeed substantial, but a number of Class B stockholders challenge it as unfair and inadequate.

THE OBJECTIONS

[12, 13] At the hearing on this motion, Class B stockholders or their attorneys appeared and others communicated with the Court by letter to voice their objections to approval of the Plan. There are eighteen objectors who own a total of approximately 1,167 shares.[40] They concentrate their attack on the alleged inadequacy of the exchange for their holdings; its tax consequences; they also contend the settlement is unfair as between them and Alleghany as the majority Class B stockholder. Almost all the objectors agree that the litigation should be settled, but on better terms than those proposed; failing that, they urge rejection of the settlement.

The primary objection is that the package exchange of $850–16 shares of new

38. *Cf.* Mutual Shares Corp. v. Genesco, Inc., [1967–1969 Transfer Binder] CCH Fed.Sec.L.Rep. ¶ 92,315 (S.D.N.Y.1968); Cherner v. Transitron Electronic Corp., 221 F.Supp. 48, 51 (D.Mass.1963).

The fact that the form of the settlement decided upon is somewhat unusual and that it includes some benefits which cannot be evaluated in financial terms does not militate against its acceptance; the parties are permitted great freedom in shaping the form of settlement consideration. *Cf.* Derdiarian v. Futterman Corp., 38 F.R.D. 178 (S.D.N.Y.1965); Manacher v. Reynolds, 39 Del.Ch. 401, 165 A.2d 741, 747 (Ch.1960); Levey v. Babb, 39 Misc.2d 648, 241 N.Y.S.2d 642 (Sup.Ct.1963).

39. *Compare* Winkelman v. General Motors Corp., 48 F.Supp. 490, 495 (S.D.N.Y. 1942).

40. The 39,371 outstanding Class B shares are held by some 950 individuals or corporations. That a comparatively small number of holders of shares reflecting a small percentage of the total outstanding oppose, as against a great majority who favor, the settlement does not relieve the Court of its function in passing upon the fairness of the proposal. *See* Protective Comm. v. Anderson, 390 U.S. 414, 435, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968); *cf.* American United Mutual Life Ins. Co. v. City of Avon Park, 311 U.S. 138, 148, 61 S.Ct. 157, 85 L.Ed. 91 (1940).

common stock for each share of present Class B stock yields substantially less than the value of the shares to be surrendered. The substance of this challenge rests principally upon the existing rights of the Class B stock as against those of the Class A stock. A major premise in the objectors' attack is their view that realistically the Class A stock is a noncumulative preference stock limited to a $5 per year dividend and to $100 per share upon liquidation; that realistically the Class B stock is the common stock entitled to unlimited dividends as may be declared and to all MoPac's equity above the $100 per share attributable to the Class A stock. These differences are the hard core of the objectors' valuation and other contentions. However, merely to state the differences in rights between the two classes of stock is too simplistic an approach; countervailing factors cannot be ignored. A factor of force is that the Class A stock, whether termed a "preference" or "hybrid" stock, or otherwise, has one vote per share, just as each share of Class B stock, with the result that the Class A stock not only controls the management of MoPac, but also can and, as plaintiffs charge, does exercise this control to withhold dividends from the Class B stock, whereas the Class B stock, a small minority of all outstanding shares, has the veto power over mergers, consolidations and other important corporate actions, and yet it is without sufficient voting strength to elect even one director. Another countervailing factor which cannot be disregarded is that the Class A stock, while noncumulative, is entitled to receive dividends out of retained earnings in each year even if current earnings for a particular year may be insufficient to cover dividend requirements on the A stock. Consideration of the objectors' contentions with respect to the value of their stock cannot ignore these elements. Thus we turn to the specific objections.

Almost all the parties are in accord that the new common shares can be valued at about $100 per share, so that the $850–16 share package conversion rate equals approximately $2,450 for each present Class B share. But objectors and proponents differ on the present value of the B stock, as well as the A stock. It would serve no useful purpose to analyze in detail their computations whereby they evaluate the present worth of each class. Their differing estimates derive from the methods used to value the shares.

Most objectors evaluate the shares by their book value. Several apply the capitalization of net earnings method; in this instance, they allocate to the Class B stock all of MoPac's annual net earnings above the annual Class A dividend requirements. Their position is that the earnings of the Class A stock cannot exceed its maximum dividend, that is, $9,319,000, or $5 per share, and consequently the balance of each year's earnings should be allocated to the Class B stock. By their respective methods the objectors calculate that the present worth of each share of Class B stock ranges from somewhat over $4,000 to the unrealistic, if not astronomical, figure of $25,000. Those objectors who capitalize net earnings as allocated by them to the Class B stock estimate, at a price-earnings ratio of 10–1, its value at $4,450 per share. At a 9–1 ratio, it would be $4,005 per share (1972 earnings).

The proponents, in evaluating the present worth of the two classes of stock, also apply the capitalization of recent earnings method (1971–1972). However, their method of allocation of earnings differs from that of the objectors. Instead of deducting the Class A maximum annual dividend requirement from net earnings, the proponents take into account the market value of the Class A stock, which shortly before the announcement of the settlement, was selling be-

tween $70–75 per share.[41] They capitalize MoPac's earnings for the two years on a 9–1 basis, resulting in its capitalized value of $225,000,000 to $243,000,000. The market value of the Class A stock is deemed its true value, and accordingly its aggregate market value is deducted from MoPac's capitalized value and the difference allocated to the Class B stock, with the end result that the Class B stock is valued at an average of $2,365 per share; a 10–1 capitalization rate would bring the average value somewhat higher.

[14, 15] Before considering the respective contentions, it is desirable to emphasize the Court's function on this application, already referred to; particularly so, since a number of objectors advance their arguments of stock valuation as if this were a proceeding under section 77 of the Bankruptcy Act,[42] where the phrase "fair and equitable," a term of art,[43] requires recognition of priority rights of senior securities owners on the basis of full compensatory value. The Court here is not called upon to make a definitive assessment of the value of each class of stock, old or new—that is not even a requirement were the proceeding one under section 77,[44] where with its standard of "fair and equitable," it is recognized that "the pretenses of exactitude" in determining a dollar value for a railroad property is somewhat illusory.[45] The Court here is concerned with the proposed settlement of a lawsuit and whether its terms, taking into account the probabilities of success upon a trial, and all pertinent factors, are "fair, reasonable, and adequate . . . terms [that] are general and cannot be measured scientifically."[46] In passing upon a proposed settlement of a stockholder's litigation, the standard "fair, reasonable and adequate" is not to be equated with "fair and equitable," applicable to a proposed railroad reorganization under the Bankruptcy Act. In the compromise of a stockholder's lawsuit there necessarily come into play "practical adjustments,"[47] elements of give and take by the respective interested parties, depending upon their strengths and weaknesses in the litigation;[48] and, of course, the uncertainty of its outcome, as well as the rewards, if successful, are important considerations in the process of compromise and concession.

[16, 17] First, as to book value as a method of valuation. The authorities are in agreement that book value is of little significance in appraising the value of stock; that what is of prime significance is a corporation's earning potential based on past experience.[49] The contention made by the objectors as to the change in equity between the two classes of stock is related to the book value concept. There appears to be no dispute that should the new preferred

41. Consideration was given to the effect of the public announcement of the proposed settlement.

42. 11 U.S.C. § 205.

43. Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 115, 60 S.Ct. 1, 84 L.Ed. 110 (1939).

44. *See* Group of Institutional Investors v. Chicago, M. St. P. & Pac. R. R., 318 U.S. 523, 564–565, 63 S.Ct. 727, 87 L.Ed. 959 (1943).

45. *Id.* at 565, 63 S.Ct. 727.

46. West Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710, 740 (S.D.N.Y.1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971).

47. *Cf.* Group of Institutional Investors v. Chicago, M., St. P. & Pac. R. R., 318 U.S. 523, 565, 63 S.Ct. 727, 87 L.Ed. 959 (1943).

48. *See* Masterson v. Pergament, 203 F.2d 315, 330 (6th Cir.), cert. denied, 346 U.S. 832, 74 S.Ct. 33, 98 L.Ed. 355 (1953); Percodani v. Riker-Maxson Corp., 50 F.R.D. 473, 477 (S.D.N.Y.1970).

49. *Cf.* Ecker v. Western Pac. R. R., 318 U.S. 448, 483, 63 S.Ct. 692, 87 L.Ed. 892 (1943); Consolidated Rock Prods. Co. v. Du Bois, 312 U.S. 510, 525–526, 61 S.Ct. 675, 85 L.Ed. 982 (1941).

(1,864,052) shares be converted into new common, the equity position of the B stockholders would be reduced from 61½% to 25½%. The objectors and proponents differ as to the importance of the shift in equity. The terms equity and book value are essentially synonymous.[50] They would have relevance if there were the prospect of MoPac's liquidation[51] or a takeover of the railroads by the government. Neither liquidation nor the nationalization of the railroads of the country is an imminent likelihood. Judge Learned Hand's sage observation of the fallacy of measuring the value of shares by their book value is as sound today as when he stated it almost fifty years ago:

> "The suggestion that the book value of the shares is any measure of their actual value is clearly fallacious. It presupposes, first, that book values can be realized on liquidation, which is practically never the case; and, second, that liquidation values are a measure of present values. Everyone knows that the value of shares in a commercial or manufacturing company depends chiefly on what they will earn, on which balance sheets throw little light. . . ."[52]

Next, as to the capitalization of earnings method, it has been already noted that the difference in valuation between objectors and proponents of the Class A and Class B stock results from different methods of allocating earnings to the two. Since the matter is one of judgment, there is room for disagreement. The Court has examined the submissions of the parties on this subject and is persuaded that the method of valuation, which takes into account the market value of the Class A shares and the underlying factors in its support offered by an expert retained to give an independent evaluation, is of substance and merits consideration.[53] The expert, after taking into account the market value of the Class A stock, valued the Class B stock at $2,365 per share.[54]

[18] The Class A stock is listed on the New York Stock Exchange, is traded in a broad market, and almost 700,000 shares are held by the public. With an active market for the Class A stock, it cannot be said that to ascribe the market price as its fair value is unreasonable. The market evaluation of a stock may reflect a more realistic appraisal of its value than a conceptual evaluation. Theory must yield to the reality of the market place, "the true appraiser."[55] Indeed, to quote Judge Learned Hand again: "When all is said, value is nothing more than what people will pay for . . . ."[56]

[19] The Class B stock is traded in on the over-the-counter market; the market is thin; and the traders are few. The market for the Class B stock has never approached the values urged by the objectors. The range has been be-

50. *See* Accountants' Handbook § 3, at 11 (R. Waxon ed. 1965); Prentice-Hall Encyclopedic Dictionary of Business Finance 78–79, 237 (1960).

51. MoPac's financial expert is of the view that were the corporation to liquidate it would probably be in such poor financial condition that no equity would be available for distribution to stockholders. Affidavit of F. L. Lee Jones, Jan. 23, 1973, at 6.

52. Borg v. International Silver Co., 11 F.2d 147, 152 (2d Cir. 1925).

53. Affidavit of F. L. Lee Jones, Jan. 23, 1973.

54. Alleghany's chief financial officer also took into account the market value of the Class A stock in appraising the value of the Class B stock and reached approximately the same valuation. Affidavit of John J. Burns, Jan. 22, 1973.

55. New York, N. H. & H. R. R., 1st Mtg. 4% B. C. v. United States, 305 F.Supp. 1049, 1069 (S.D.N.Y.1969) (Weinfeld, J., dissenting), vacated sub nom. New Haven Inclusion Cases, 399 U.S. 392, 90 S.Ct. 2054, 26 L.Ed.2d 691 (1970).

56. Borg v. International Silver Co., 11 F.2d 147, 152 (2d Cir. 1925).

tween $1,100 and $2,500 per share.[57] The conclusion is warranted that the public market, in pragmatic terms, has taken into account MoPac's unusual capitalized structure, whereby a so-called preference stock has voting rights that control not only MoPac's management, but also its dividend policy with the power to withhold dividends from the Class B stock, and accordingly appraised the value of the two classes of stock based upon their respective power, rights and restrictions.

Another factor suggests that the proponents' experts' valuations are closer to the mark than the objectors' valuations. Alleghany, as the majority owner of the Class B stock, has, through the years, been the principal antagonist to Mississippi, the majority owner of the Class A stock. Widely divergent views as to the B stock's value have, up to the present, foreclosed any compromise. Alleghany's acceptance of the settlement as a disposition of their longstanding controversy during which it has spent millions to protect its investment may be said to reflect a realistic recognition of the true value of the Class B shares. If the objectors' evaluation of $4,000 or more per share is sound, then Alleghany, owning in excess of 21,000 shares, has, after many years of litigation, suddenly given up the ghost and yielded more than $40,000,000[58]—hardly a likelihood in view of the history of events and the sophistication of its financial executives and advisers.

Also, it is not without significance that objector Garfield's securities expert, who on the capitalization of earnings method fixes a value of "over $4,000" a share for the Class B stock, nonetheless concludes "that if the impasse between the Class A and the Class B is to be settled, there must be a compromise at a lower figure to reflect the lack of voting control of the Class B"[59]—another way of saying that any evaluation of the stock must make allowance for its encumbered status. Obviously that compromise figure cannot be a matter of mathematical precision; it need not be: it is a matter of judgment based upon a consideration of factors pro and con, some of which have been adverted to above. This Court is satisfied that the package of $850–16 shares common stock in exchange for each Class B share cannot be said to be inadequate, especially so when considered as a compromise.

However, the objectors argue that even so, the plan is unfair in that the compromise should be only in terms of new common stock and not include any cash payment. They contend that the $850 cash payment per share will be taxed as ordinary income, and with their individual income situations they will be subjected to high surtax rates, whereas Alleghany, by reason of its corporate structure, faces, with respect to the cash payment, a 7.2% rate. Objector Garfield contends that under the cash-stock exchange, Alleghany will benefit by over $4,000,000 in comparison with an all stock plan. Several alternative plans, including a tax free exchange (24½ shares of new common instead of the $850–16 shares for each Class B share) are proposed by objectors as being more equitable. Many of these suggestions

57. While the Class B stockholders contend that the market price of their stock has been depressed by the acts of the defendants, we deal with the fact situation as it exists. Whether the market price of the Class B shares is the consequence of defendants' alleged conduct is one of the issues to be decided were the case to go to trial. Similarly, objections directed at the failure of MoPac to report the earnings allocable to the B shares, as to which defendants offer an explanation, also go to the merits of plaintiffs' claim, not to the fairness or adequacy of the settlement.

58. Even assuming objector Garfield's contention as to tax consequences is correct (*see* p. 371 *infra*), an alleged tax benefit of $4,000,000 to Alleghany under the part cash payment plan would hardly justify giving up $40,000,000.

59. Affidavit of David M. Day, Jan. 30, 1973, ¶ 5.

were considered during the course of the extended negotiations. One such plan envisaged giving the minority Class B stockholders an option to receive all stock (24½ shares) in exchange for each Class B share instead of the $850–16 share package. However, based upon the opinion of independent tax counsel retained especially by the Class B representatives, other than Alleghany, this alternative was rejected since its tax consequences were potentially more unfavorable than those under the cash and stock exchange. Independent tax counsel was of the view that such an option would have exposed a substantial portion of the shares to ordinary income tax treatment.

Another approach would have eliminated the cash payment and given only stock to all Class B stockholders, including Alleghany. This proposal met with rejection because it would lower Mississippi's degree of control below its present level and further could fail to eliminate the present divided control within MoPac since Mississippi would control the preferred but not necessarily the common. To assure elimination of the divided control, as well as the friction and litigation it has engendered, Mississippi deems it essential that it have a substantial majority interest in both classes of stock. This accounts for its cash tender offer to purchase not less than 400,000 shares of new common at $40,000,000 and Alleghany's commitment to tender all its 339,888 shares of new common stock upon their receipt. Additionally, the proposal would place Alleghany in a minority position without real control over its investment and deprive it of the veto power it now has as the majority owner of the present Class B stock. Neither Mississippi nor Alleghany was amenable to this situation. Objector Garfield's suggestion that if Mississippi desires to retain its present degree of stock control that it purchase the additional shares of the new common stock to be issued to Alleghany under an all stock exchange would require Mississippi to expend, in addition to its present commitment of $40 million cash, another $20 million, an added obligation it is not prepared to assume.

[20] Whether or not the reasons for rejection of the alternative proposals were justified is not the question before this Court, which is called upon to decide whether the settlement reached by the litigants and submitted for approval is fair and reasonable. The discharge of this function does not require the Court to reopen negotiations in an effort to secure more advantageous terms, which plaintiffs, in sophisticated and arms length bargaining, were unable to secure for themselves and the class they represent. Taxes are taxes; the rates are fixed by Congress; they cannot be adjusted in particular cases to accommodate an individual taxpayer's obligation as to income derived from the settlement of a lawsuit. The tax will vary in the instance of each Class B stockholder dependent upon his particular bracket, and even corporations other than Alleghany, which may own Class B stock, will face varying tax payments. The fact is that two-thirds of the conversion package is tax free. Moreover, were the case to proceed to trial and plaintiffs secured a judgment declaring the Class B stockholders entitled to dividends in given years, the entire proceeds received by each shareholder would be taxed as ordinary income. Under all the circumstances, it cannot be said that the $850 cash payment constituting part of the conversion rate is unfair.

OTHER OBJECTIONS

[21] Several objectors question the adequacy of the notice of the proposed settlement given to stockholders, which was mailed to each registered stockholder and published in the Wall Street Journal (National Edition). The objections go to the contents of the notice. However, it sufficiently informed any interested stockholder of the nature of

the pending action, the general terms of the settlement, that complete and detailed information was available from the files of this Court, and that any stockholder could appear and be heard at the hearing; in sum, the notice fairly apprised the members of the class of the pertinent terms of the proposed compromise and the significance of the entry of a final judgment approving the settlement.[60]

Two Class A stockholders of fifty shares object because the settlement is contingent upon Mississippi's ability to finance its tender offer obligation, and therefore, "if such financing is not available, the parties will have gone to considerable expense . . . to no good purpose." However, Mississippi already has secured a formal commitment of financing which has been found satisfactory by Alleghany and its counsel.[61] The same objectors also express concern over the possible effects of the cash payout upon MoPac's financial structure. MoPac has represented that this presents no problem to a railroad of its size.[62]

A MoPac debenture holder has raised a question as to possible impairment of the rights of debenture holders. Under the terms of the settlement, an opinion of MoPac's counsel is required to the effect that none of the transactions are in breach or in default of any of the provisions of any indenture or other instrument binding upon MoPac. It is represented to the Court that MoPac's counsel upon a review of all documents is prepared to render such an opinion.

Objections are made to fees requested by attorneys representing the respective plaintiffs. To the extent that such allowance may be granted, the parties are to be paid equally by Mississippi and MoPac. However, the fee applications are, in the event of acceptance of the settlement, subject to approval by the Court and a separate hearing, notice of which will be given to all interested parties, at which time any objections may be presented to the Court.

CONCLUSION

This Court, after thorough consideration of all pertinent factors and of the extensive contentions of the objectors and proponents with respect thereto, and weighing the benefits to be derived from the settlement against the alternative of a continuance of this litigation, with its outcome doubtful, and, even if successful, the uncertainty of any meaningful recovery, concludes that the settlement falls within a "range of reasonableness"[63] that warrants its approval. In sum, it offers a permanent solution to the longstanding impasse between the two contending groups of stockholders—a result that cannot be achieved through successful litigation. Indeed, continued litigation may be said to be an exercise in futility since the hard core of the cause of differences between the two groups would remain and continue to plague them and MoPac. The settlement will afford MoPac the opportunity to pursue merger prospects so vital to its economic growth and existence and to permit its officers to give full time and attention to corporate affairs. Also

60. Air Lines Stewards Local 550 v. American Airlines, Inc., 455 F.2d 101, 108 (7th Cir. 1972); *see* United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co., 447 F.2d 647, 654 (7th Cir. 1971); *see also* Winkelman v. General Motors Corp., 48 F.Supp. 490, 494 (S.D.N.Y. 1942).

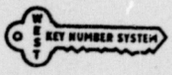
61. Defendants' Supplemental Reply Memorandum at 5–6; Hearing Minutes at 41–42.

62. *See* Jones Affidavit at 5; Affidavit of Downing B. Jenks, Jan. 22, 1973, at 10.

63. *See* Newman v. Stein, 464 F.2d 689, 693 (2d Cir.), cert. denied, Benson v. Newman, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972); *see also* United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co., 447 F.2d 647, 655–56 (7th Cir. 1971).

it means the prospect of greater annual dividends to the Class B stockholders; a broader market for their shares; and the opportunity for representation on the Board of Directors. Even were it to be found that the Class B stock approached the approximate $4,000 value per share as estimated by a number of objectors, the settlement still would come within a range of reasonableness and warrant approval. Finally, if a majority of the minority Class B stockholders are of the view that the advantages of the settlement are insufficient to compensate for what they believe to be the value of their shares, they have the power to reject it.

The settlement is approved and judgment may be entered accordingly.



UNITED TRANSPORTATION UNION, an unincorporated association et al.

v.

PATAPSCO & BACK RIVERS RAILROAD COMPANY, a body corporate.

Civ. No. 70-202.

United States District Court, D. Maryland.

March 29, 1973.

On remand, 327 F.Supp. 608, the Special Board clarified its award in railway labor case and successful union sought award of attorney's fees. The District Court, Frank A. Kaufman, J., held that where railroad complied with award as it interpreted it, union brought court proceeding to enforce award, and court remanded case to Board for clarification, award of attorney's fees to union which was successful in having its interpretation enforced would not be made.

Application denied.

1. Federal Civil Procedure ⇐2737.5

If on court review after Special Board has made award in railway labor dispute and after carrier has failed to comply with award, a court enforces award in proceeding brought under statute authorizing enforcement proceeding by aggrieved employee, attorney's fees are mandated if petitioning employees succeed. Railway Labor Act, § 3, subds. 1(p, q), 2, 45 U.S.C.A. § 153, subds. 1(p, q), 2.

2. Federal Civil Procedure ⇐2737.5

Allowance of attorney's fees under statute authorizing such fees where aggrieved employee successfully petitioned court to enforce award in railway labor dispute insures that employees who prevail will not be deterred from realizing benefit thereof by economic burden of attorney's fees incurred thereafter in court proceedings which result in enforcement of award by court order. Railway Labor Act, § 3, subd. 1(p), 45 U.S.C.A. § 153, subd. 1(p).

3. Federal Civil Procedure ⇐2737.5

Policy of insuring that railway employees who prevail in labor dispute would not be deterred from realizing benefit of award by economic burden of attorney's fees incurred in court proceedings which result in enforcement of award does not obtain in case in which carrier fully complied with award as it interpreted it, carrier's interpretation was reasonable, either union or carrier could have sought clarification, union sought to have court enforce award as union interpreted it, and reviewing court determined that award was sufficiently ambiguous to require clarification by board. Railway Labor Act, § 3, subd. 1(p), 45 U.S.C.A. § 153, subd. 1(p).

4. Federal Civil Procedure ⇐2737.5

Where railroad complied with award as it interpreted it, union brought court proceeding to enforce award, and court remanded case to board for clarification, award of attorney's fees to union which was successful in having its inter-

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5/7/73

U.S. DISTRICT COURT
FILED
MAY 2 1973
S.D. OF N.Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LeVASSEUR, Plaintiffs, -against- MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK, Defendants.	67 Civil 5095 (EW) ORDER AND FINAL JUDGMENT

The parties to this action having submitted to the Court for its approval, pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, a Stipulation of Settlement dated December 18, 1972; and

By Order dated December 20, 1972, the Court having directed that a hearing be held on January 25, 1973, to determine whether the terms and provisions of the Stipulation of Settlement were fair, reasonable, adequate and proper and should be approved, and to determine whether final judgment should be entered in accordance with the Stipulation of Settlement and having directed that notice of the settlement hearing be given to the MoPac stockholders in a manner specified in the order; and

Notice of the hearing having been given to the stockholders in accordance with the order of December 20, 1972, it having been mailed, on December 27, 1972, to all stockholders of record of defendant Missouri Pacific Railroad

Company, as of the close of business on December 26, 1972, and it having been published in the national edition of The Wall Street Journal on December 27, 1972; and

On January 25, 1973, a hearing having been held to determine whether the proposed settlement embodied in the terms and provisions of the Stipulation of Settlement should be approved and at that hearing an opportunity having been provided for all proponents of and objectors to the proposed settlement to be heard and to submit papers for the consideration of the Court; and

The Court having considered the prior proceedings in this action, and the matters submitted to it, and after due deliberation having rendered an opinion on March 19, 1973, and having determined that a final judgment should be entered; it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That the terms and provisions of the Stipulation of Settlement dated December 18, 1972, are fair, reasonable, adequate and proper to the Missouri Pacific Railroad Company and to the members of the class consisting of all of its Class B stockholders, and the same are hereby approved, as per the opinion of the Court dated March 19, 1973.

2. That the notice to the stockholders of the hearing was fair, adequate and sufficient and constituted compliance with Rules 23(e) and 23.1of the Federal Rules of Civil Procedure.

3. That any and all objections to the terms and provisions of the Stipulation of Settlement are hereby overruled.

4. That the parties to the Stipulation of Settlement are hereby authorized and directed to consummate the settlement of this action pursuant to the terms and provisions of the Stipulation of Settlement.

5. That the Complaint and Amended Complaint of Betty Levin, the Complaint and Amended Supplemental Complaint of Alleghany Corporation, and the Complaint of Robert LeVasseur are hereby dismissed as against all defendants on the merits, with prejudice and without costs to any party.

6. That the Court retains jurisdiction of all matters respecting the consummation of the settlement of this action pursuant to the Stipulation of Settlement and for the purpose of entertaining applications for attorneys' fees and expenses by counsel for plaintiffs Betty Levin and Robert LeVasseur and by plaintiff Alleghany Corporation.

Dated: New York, New York
May 24, 1973

Edward Weinfeld
EDWARD WEINFELD
U.S.D.J.

Judgment entered:
May 2, 1973

Thomas E. Andrews
Acting Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

BETTY LEVIN ET AL	x	
		Docket T-2345
VERSUS	x	
MISSISSIPPI RIVER CORP. ET AL	x	Petition for Order to Show Cause
	x	

WILLIAM R. WESSON, by and through his attorney, GERARD M. CAREY, petitions this court as follows:

Statement

Petitioner, pending his appeal, seeks (1) an order of this court, restraining the parties of the above captioned action, and defendant Missouri Pacific Railroad Company (Mo Pac) in particular, from carrying out the terms of the judgment entered May 2, 1973, and appealed from; and in the alternative (2) that Mo Pac be ordered to correct and amend its Notice of a Special Meeting and Proxy Statement to its stockholders for a meeting scheduled for June 15, 1973; or (3) that this court on the papers attached decide the question of law, viz. that the settlement in the Court below was beyond the said Court's adjudicatory power.

Facts

1. In December, 1967, plaintiff Levin, with plaintiffs Alleghany and Le Vasseur subsequently intervening, commenced suit in the Federal District Court (S.D.N.Y.) against the defendants.

The thrust of the plaintiffs' complaints were that

they as holders of Class B stock were not being treated fairly, with respect to payment of dividends, by the defendants, and Mississippi River Corporation (M.R.C.) in particular, since M R C held control of the majority of the voting stock power and controlled dividend declaration, and ~~none~~ nominal were declared.

The defendants, in their answer, denied the material allegations of wrongdoing, and set up the defense of business justification for not paying proper dividends to the Class B stockholders.

2. Mo Pac, since its reorganization in 1956, has two classes of stockholder, viz., A and B. Class B, of which the plaintiffs and the petitioner are owners, is the more valuable of the two, since it represents the equity of Mo Pac. Class A shares are limited to receive, when declared, noncumulative dividends not to exceed $5 per year, and, in the event of dissolution or liquidation, the first $100, together with any dividends declared and unpaid.

Petitioner verily believes that the present equity value of Class B stock per share is in the range of $15,000.00 to $25,000.00, instead of the mere $2,450.00 value set by the Court below.

3. On October 9, 1968, the above described action was determined to be a Class action under Rule 23 (a), (b) (1) and (b) (2) of the Federal Rules of Civil Procedure, this by order of Hon. Frederick Van Pelt Bryan. The class, purportedly represented by the plaintiffs, was all the owners of Class B stock in Mo Pac, of which the petitioner was one.

4. On December 20, 1972, after extensive pre-trial examinations by all the parties to the suit, petitioner was given "Legal Notice" of hearing as to whether or not a proposed settlement of the suit was fair and reasonable to the stockholders of Class B stock of Mo Pac represented by the plaintiffs.

Petitioner attended the hearing on January 25, 1973, and along with other Class B stockholders opposed the so-called settlement.

The so-called settlement called for (a) discontinuance of plaintiffs' suit for dividents; (b) recapitalization of Mo Pac with complete distruction of Class B stockholders, and the issuance of new stock certificates which would, even in the opinion of the Court, reduce petitioners' equity, and that of each class B stockholder, from 61½% to 25⅛%; and (c) placing a value on each Class B certificate of $850 cash plus 16 shares of the new certificates valued at $100 each.

5. On March 19, 1973, despite objections of the petitioner and other Class B stockholders, the Hon. Edward Weinfeld rendered an opinion approving the so-called settlement plan as proposed, making it binding upon petitioner and all other Class B stockholders.

6. On March 26, petitioner, by motion, returnable April 10, 1973, moved Judge Weinfield to determine that the proposed settlement, opinion and any judgment entered thereon be modified ~~or~~ to provide that petitioner was not bound.

The said motion was denied after argument on the return date.

7. On May 4, 1973, a notice was sent to petitioner of the entry on May 2, 1973, of the judgment of Judge Weinfeld effectuating his opinion (a) approving the agreement; (b) setting a value of $850 cash plus 16 shares of the recapitalized stock of Mo Pac for each share of class B stock; and (c) subject to approval by the stockholders and Federal governmental agencies.

8. On May 8th the Board of Directors of Mo Pac sent a proxy statement to the stockholders, together with an invitation to vote at a special meeting to be held June 15, 1973, at 10:30 A.M. in St. Louis, Missouri, to approve recapitalization according to the plan approved by Judge Weinfeld.

9. On May 15, 1973, petitioner filed Notices of Appeal, both from Judge Weinfeld's denial of Petitioner's Motion and his judgment approving the recapitalization, as a fair and reasonable settlement under Rule 23 (e) of the Federal Rules of Civil Procedure.

What is Wrong With the Judgment Below

However well intentioned the Court was, its decision and judgment, approving a recapitalization and setting a value on petitioner's class B stock was illegal, unnecessary and unfair.

1. Its Illegality stems from the fact that the so-called settlement by way of recapitalization: (a) goes beyond the pleadings, is different from any issue raised in the litigations, and gives to the plaintiffs and defendants rights over the petitioner's private property--which said parties neither claimed or could claim.

(b) destroys the integrity, character and legal rights of the represented Class B stockholders, when such integrity, character, and legal rights were never in issue or jeopardy in the suit, even when the suit was made a class action.

(c) is not a compromise within the meaning of Rule 23 (e), but constitutes a business negotiation carried on in the sanctity of the Court under the guise of a litigated matter.

(d) constitutes an advisory opinion and judgment beyond the adjudicatory power of the Court.

(3) violates petitioner's constitutional right to due process in that his property rights in his stock were determined and effected when there was no adjudicatory power in the Court to make such a determination.

2. The decision and judgment of the Court was unnecessary in that the trustees of Mo Pac, at any time, could have proposed to the stockholders a plan of recapitalization. The Court's aid was not needed for this. And even as a practical matter, should the stockholders vote down a proposed recapitalization plan, neither Mo Pac, its trustees or disgruntled minority stockholders had a legal right, cause of action or claim to seek judgment of the Court ordering a recapitalization.

3. The decision and judgment of the Court below was unfair in that

(a) petitioner and other individual Class B stockholders will be forced to sustain a tremendous income tax assessment if the recapitalization goes through. The Court set an exchange of $850 cash plus 16 new shares for every share of Class B stock. This $850 dollars in cash must be treated as ordinary income, and in petitioner's cases would add up to $63,750 for his 75 shares of Class B MoPac stock. Similar and worse tax consequences will pertain for other individual owners, but not for the corporate plaintiff Alleghany Corporation which fostered andfoisted the alleged settlement on the individual holders of Class B stock.

(b) the value of each share of class B stock, in the professional opinion of petitioner is $10,000 to $25,000 and not the $2450.00 per share value set by the Court below.

(c) the setting of such a low value per share of petitioner's stock was done under the atmosphere of getting rid of a complicated litigation, and was premature and prejudicial to the rights of petitioner to a full hearing and deliberation on the value of his stock.

(d) it deprives petitioner of his rights as one opposed to recapitalization of Mo Pac to have the value of his stock determined according to the applicable law of Missouri Sec 251.090 (4) Gen. and Bus. Corp. Law of Missouri.

(e) it constitutes an unjudicial interference in business dealings and evaluation beyond the jurisdiction of the Court which determined the same, and when such act of the Court was unnecessary.

(f) it violated due process of law.

397 (g) it gives color of approval of the Court to the special meeting of the stockholders.

What is Wrong With the Proxy Statement?

The proxy statement issued by MoPac for the special election relative to the Court's ordered recapitalization plan is misleading, and contrary to S E C regulations in that: it fails to advise the stockholders that:

1. the judgment of Judge Edward Weinfeld approving the plan is now in the process of appeal on jurisdictional grounds;

2. it does not clearly advise the stockholders that the $350 dollars in cash is to be treated as ordinary income for tax purposes;

3. on page 2 thereof, at the bottom, it does not set forth the Missouri law on the rights of stockholders for appraisal of their stock; nor does it set forth the opinion of Mo Pac counsel on this issue; nor does it advise that the Gen. and Business Corporation Law of Missouri with respect to appraisal is applicable to the Missouri Railroad Corporation Law when it is silent;

4. all the party plaintiffs in the action below have not signed the agreement of settlement.

Relief Requested is Reasonable

A landmark decision, in light of the above, is needed by this Court in order to clarify Rule 23 (e), and prevent, as in this case, such application chosen by the Court below, which wrecks havoc and places in jeopardy the rights of every stockholder and property owner in America.

The temporary enjoinment of the June 15, 1973 special election on recapitalization is proper in that:

(1) irreparable harm will be done to petitioner and those in similar situation if it is held;

(2) the proxy statement does not fully disclose the key factors which must be considered by the voting stockholders;

(3) the judgment and opinion of the Court below, erroneous as it is, gives an improper aura of legality to the proposal to recapitalize, and deprives petitioner of a proper evaluation of his stock under Missouri applicable law; and

(4) in light of the length of time the matter has been in litigation, and in light of the rights of small stockholders and the economic loss to them, no urgency to hold the meeting on June 15th can be shown, or any irreparable damage done by granting the temporary injunction.

WHEREFORE petitioner, for the reasons above stated, requests this honorable Court for an order directing the parties to the above captioned action to show cause before this Court why

(a) the special meeting of Mo Pac scheduled for June 15, 1973, should not be adjourned pending the determination by this Court of the petitioner's appeal; and in the alternative

(b) why Mo Pac should not be ordered to correct its proxy statement in the areas mentioned above and to mail the corrected statements to its stockholders; or

(c) why this Court should not determine on these papers the question of law as to whether or not the settlement of the Court below conformed to Rule 23 (e) of the Federal Rules of Civil Procedure; and for such other and further relief as to this Court seems just and proper.

Dated: Brooklyn, New York

4 June , 1973

William R. Wesson

William R. Wesson

State of New York

County of Kings

Sworn to before me this

4 day of June , 1973

Gerard M. Carey
Notary Public, State of New York
Qual. Kings Co.
#5608849
Term expires 3/30/74

United States Court of Appeals

FOR THE

SECOND CIRCUIT

FILED
U.S. DISTRICT COURT
JUL 9 9 37 AM '73
S.D. OF N.Y.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twelfth day of June one thousand nine hundred and Seventy-three.

Present: HON. IRVING R. KAUFMAN,
Chief Judge

HON. J. JOSEPH SMITH,
Circuit Judge

HON. FREDERICK vP. BRYAN
District Judge
~~Circuit Judges~~

WEINFELD J.

67 Civ. 5095

Betty Levin, on behalf of herself and all other holders of the Class B Common Stock of Missouri Pacific Railroad Company, and on behalf of said corporation and Robert LeVasseur and Alleghany Corporation, Plaintiffs, William R. Wesson, a Class B Stockholder in Missouri Pacific Railroad Company, Plaintiff-Appellant, v. Mississippi River Corporation, Missouri Pacific Railroad Company, Robert H. Craft, T.C. Davis and Thomas F. Milbank, Defendants-Appellees.	73-1864 73-1865

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on Judge Weinfeld's opinion below, ____ F. Supp. ____ (S.D.N.Y. 1973).

JUDGMENT ENTERED JUL 10 1973

Raymond F. Burghardt
Clerk

Irving R. Kaufman
Chief Judge

Circuit Judge

District Judge

A true copy,
A. Daniel Fusaro
Clerk

Mr. Pikna

Allegheny Corp
Surg CT Ct Re
3899-32C
#7

ENTERED
IN OFFICE DOCKET
12/19/73

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

December 17, 1973

Gerard Carey, Esq.
617 Third Street
Brooklyn, New York 11215

RE: WESSON, ET AL. v. LEVIN, ET AL.,
73-663

Dear Sir:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By
Helen Taylor
Helen Taylor, (Mrs.)
Assistant Clerk

cc: David W. Peck, Esq.
M. Lauck Walton, Esq.
Abraham L. Pomerantz, Esq.
Sheldon H. Elsen, Esq.

Everett I. Willis, Esq.
Dewey, Ballantine, Bushby,
Palmer & Wood
140 Broadway
New York, N.Y. 10005

ENTERED IN OFFICE DOCKET
Rec'd by mail on
1/14/74

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-663

WILLIAM R. WESSON, a CLASS B STOCKHOLDER in MISSOURI PACIFIC RAILROAD COMPANY, for himself and all others similarly situated,

Appellant,

v.

BETTY LEVIN, on behalf of herself and all other holders of CLASS B COMMON STOCK of MISSOURI PACIFIC RAILROAD COMPANY, and on behalf of said corporation, and ROBERT LE VASSEUR and ALLEGHANY CORPORATION,

Plaintiffs-Appellees,

against

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS MILBANK,

Defendants-Appellees.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

GERARD M. CAREY
Attorney for William R. Wesson, Petitioner
Office and P. O. Address
617 Third Street
Brooklyn, New York 11215
Telephone 212 SOuth 8-0009

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-663

WILLIAM R. WESSON, a CLASS B STOCKHOLDER in MISSOURI PACIFIC RAILROAD COMPANY, for himself and all others similarly situated,

Appellant,

v.

BETTY LEVIN, on behalf of herself and all other holders of CLASS B COMMON STOCK of MISSOURI PACIFIC RAILROAD COMPANY, and on behalf of said corporation, and ROBERT LE VASSEUR and ALLEGHANY CORPORATION,

Plaintiffs Appellees,

against

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS MILBANK,

Defendants Appellees.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

William R. Wesson, a Class B stockholder in Missouri Pacific Railroad Company (Mo Pac), on behalf of himself and all others similarly situated, petitions this Honorable Court, pursuant to

its Rule 58(2) for a rehearing of his prior petition to this court for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, said prior petition having been dated October 17, 1973, and denied by this Court by an Order entered December 17, 1973.

Proceedings Below

The Plaintiffs-Appellees, as Class B stockholders of Mo Pac, on behalf of themselves and all other Class B stockholders similarly situated, maintained a class action under Rule 23(a), (b)(1) and (2), [Fed. Rules of Civil Proc.], in the United States Federal District Court (S. D. N. Y.), against the Defendants-Appellees, basing the jurisdiction of the Court on diversity of citizenship, (Title 28 U. S. C. 1332).

The thrust of the complaint below was directed toward the dividend policy with respect to the Class B stock, which the Plaintiffs-Appellees claimed was inadequate and too low.

The Class B stockholders owned the equity of Mo Pac, but represented only 2% of the voting stock. The Class A Stockholders were limited to only a $5 non-cumulative annual dividend when and if earned and declared, plus $100 per share on dissolution or liquidation, with no further participation in the equity of Mo Pac. Class A stockholders controlled 98% of the voting stock, and had the power to elect Mo Pac's Board of Directors and determine dividend policy with respect to the equity owners —Class B stockholders. In essence the Class B stockholders were the common stock equity owners, and the Class A stockholders were in reality non-cumulative preferred stockholders with voting control. [Reorganization Plan of Mo Pac effective March 1, 1956; Missouri Pac. R. R. Reorganization 290 I. C. C. 477 (1954), approved in In Re Missouri Pac. R. R., 129 F. Supp. 392 (E. D. Mo.), aff'd sub nom. *Missouri Pac. R. R. 5¼% S. B. C.* v. *Thompson*, 225 F. 2d 761 (8th Cir. 1955), cert. denied 350 U. S. 959 (1956).]

The defendants-appellees includes, in addition to Mo Pac and its directors, Mississippi River Corporation which in 1973

owned 63% of the voting Class A stock, and was alleged below to have misused its majority voting stock to starve the Class B stockholders, and to deprive them unjustly of proper dividends on their equity holdings.

Four years after the action below for better dividends was declared a Class action, the plaintiffs-appellees entered into a stipulation of settlement with the defendants-appellees, which settlement had nothing to do with the claim for dividends, but called for a total recapitalization of Mo Pac., something far removed from and foreign to the pleadings in the pending litigation below. The plaintiffs-appellees by this settlement abandoned their original claim or cause of action for better dividends, which was held as a trust for the petitioner and other Class B stockholders purportedly represented by the plaintiffs-appellees.

But far worse than abandonment of the class cause of action the settlement required that the represented class of Class B stockholders give up their ownership of their Class B stock, reduce their equity in Mo Pac's assets as of December 31, 1972 from 65.5% to 25.5% and transfer it to the Class A stockholders so that the latter's equity might be increased from 34.5% to 74.5%, and to accept under the recapitalization plan $850 and 16 shares of new common with stated value of $6.25 per share for each share of Class B stock, without any right to have the said stock evaluated under proceedings of due process for its actual value. All of this 61% loss of equity as of December 31, 1972 was given up by the plaintiffs-appellees, and the burden was placed on the petitioner and other represented Class B stockholders with absolutely no counterclaim or pretext of a counterclaim on the part of the defendants-appellees that they had a right to such benefits or right to recapitalization.

On May 2, 1973, the Federal District Court (S. D. N. Y.) by judgment, over the protest of the petitioner, and having denied the motion of petitioner on behalf of himself and others similarly situated that he not be bound by the said settlement, approved the said stipulation of settlement.

The United States Court of Appeals (2nd Circuit), approved the judgment of the District Court, without opinion but upon the opinion of the District Court.

Controlling Intervening Factors Which Warrant Rehearing

Aside from the dire need for clarification and guide lines as to the application of Rule 23e, (F. R. C. P., as to Compromise of a Class Action), so as to insure that the settlement of a non-true class suit has some fair and reasonable relation to the pleadings and issues in litigation, and does not compel the represented members to give up property rights which are not involved in the litigation, petitioner advances three reasons why this Honorable Court should rehear his prior petition for Certiorari.

FIRST: In the recent decision of this Court in *Zahn et al* v. *International Paper Company,* Cert. 72-888, argued October 16, 1973, decided December 17, 1973, it was established that each member of a class action, formerly known as spurious, the jurisdiction of which is based on diversity of citizenship, must have a claim meeting the jurisdictional amount of $10,000, (Title 28 U. S. C. 1332) exclusive of costs and interest.[1]

In the instant case, which was a suit the thrust of which was for better dividends, 76.1% of the Class B stockholders who were represented by the plaintiffs appellees owned 10 or less shares of Class B Mo Pac stock. By no stretch of the imagination could these represented stockholders meet the jurisdictional amount, and hence the District Court had no authority to enter judgment affecting their property rights in ther stock. This is so

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[1] This is a spurious class action because the right of the various Class B stockholders in the controversy was not joint but several. Moreover, many, if not most, of the Class B stockholders bought their stock for capital appreciation rather than cash dividends; otherwise they would not have paid from $700 to $2,500 per share for a stock paying a $5 per annum dividend. Clients of the appellant, Mr. Wesson, a stock and bond broker, and Mr. Wesson himself bought the Class B stock for capital appreciation because of its large earning power and because the 1956 Reorganization Agreed Plan made the Class B stock "The residuary beneficiary of any future prosperity the property may enjoy." 290 ICC 477 at 625. Finance Docket No. 9918. The Class B stock earned approximately $448 in 1972, using ICC accounting rules and after the maximum $5 per share dividend paid to Class A. The 1973 earnings are running substantially higher than 1972.

aside from the fact that these property rights were not in jeopardy in the litigation below and not within the jurisdiction of the District Court in any event.

A review of the Class B stockholders list of Mo Pac, at or about the time of the judgment below, reveals the following about the 922 Class B stockholders as of May 1, 1973:[2]

No. of Class B Shares Owned	Approx. No. of Class B Stockholder Owners	Percentage of Total Class B Stockholders
1 share	197	21.4%
2 shares	113	12.25%
3 shares	64	6.93%
4 shares	18	1.95%
4 or less	392	42.5%
5 or less	558	60.5%
10 or less	701	76.1%

The dividend being paid to the Class B stockholders at the time of the suit was $5 per share per year. The complaints of the plaintiffs-appellees were not clear as to how much the dividends should be, but it would unduly stretch the imagination to pretend that a holder of 5 or less shares of Mo Pac Class B stock had $10,000 involved in the controversy.

The Zahn case, (supra), coming from the 2nd Circuit, should have controlled, and the judgment of the District Court could not and should not be binding on the Class B stockholders who lacked the jurisdictional amount of $10,000.00. Because this honorable court held in Zahn that such an amount was jurisdictional and not procedural, it logically should make no difference whatsoever that the class in Zahn was pursuant to Rule 23(b)(3), (F. R. C. P.), and the class in the instant case was pursuant to Rule 23(a)(b)(1) and (2) (F. R. C. P.). In both cases the rights of the members of the class were several and not joint.

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[2] When Hon. Judge VAN PELT BRYAN issued his class action order on October 9, 1968, there were "approximately 1,200 holders of Class B;" and Alleghany Corporation was beneficial owner of 20,732 Class B shares of the total 39,731 Class B shares outstanding.

SECOND: Alleghany Corporation, the holder of 53% of Class B Mo Pac stock purported to "fairly and adequately protect the interests of the class" of Class B stockholders of which petitioner is one. (Rule 23(a)(4) F. R. C. P.).

However unknown to the petitioner, until recently through the ICC hearings on the instant recapitalization of Mo Pac as approved by the Courts below, Alleghany had been previously authorized by the ICC to acquire the Jones Motor Co. Inc. [Alleghany Corporation Control and Purchase—Jones Motor Co., Inc.—and Control Erie Trucking Company No. MC-F-10444, 109 MCC 333, decided January 27, 1970; cf. Inadequacies of Protection for Investors in Penn Central and Other ICC-Regulated Companies—Staff Study for the Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce, H. R. 92nd Congress, July 1971 Staggers Committee, Gov't Print. O. 59-2970 pages 36-38].

This acquisition of Jones by Alleghany was commenced as early as September 4, 1968 and was consummated by April 30, 1970.

The ICC in its decision of January 27, 1970 conditioned its approval of the Jones acquisition by Alleghany so that "the trustee-ship of Alleghany's Mo Pac securities as previously ordered by the Commission, be continued subject to the continuing jurisdiction of the Commission". (109 MCC 333, 350).

On October 6, 1973 Alleghany, through its attorney, filed a brief with the ICC seeking the ICC's approval of the recapitalization of Mo Pac as provided for in the settlement agreement of the judgment of the court below in the instant case. Alleghany argues in that brief that the divestiture of its (Alleghany's) interest in Mo Pac Class B stock would be in keeping with the public interest, the prior order of the ICC, (Jones Motor Co. Inc., supra 109 MCC 333), would save Alleghany from great financial injury, and relieve the ICC of the burden of supervision of the trust of Alleghany's Mo Pac stock.

From the above, two things are clear: (1) that Alleghany, contrary to its position as a class representative, had such an

over-riding self interest in divesting itself of its Class B stock by the recapitalization plan, that it could not and did not fairly represent the rights of the petitioner and others similarly situated as required by Rule 23(a)(4) (F. R. C. P.).

(2) That Alleghany was not the real party in interest to enter into the stipulation of settlement calling for the recapitalization of Mo Pac because Alleghany's Class B Mo Pac stock was at that very time in trust under "the continuing jurisdiction of the Commission" (ICC) (109 MCC 333, 350 Jones Motor Co. supra). At the very least the prior approval of the ICC should have been obtained before Alleghany signed the stipulation of settlement and/or the District Court rendered judgment approving it. The settlement of the case below went beyond the claim for dividends, (in fact abandoned that claim), and called for recapitalization of an interstate railroad, Mo Pac, something of special concern to the ICC, and because of such concern Alleghany's Mo Pac stock was at that time under the continuing jurisdiction of the ICC.

From the opinion of the District Court below it is clear that the court was unaware that Alleghany's self-interest in disposing of its Class B stock was paramount, and was not representative or beneficial to petitioner and other Class B stockholders. The District Court stated: "Alleghany's self-interest as the owner of 53% of the Class B stock gives some assurance that it negotiated to obtain the best possible terms for that group vis-a-vis the Class A stockholders". "If the objectors evaluation of $4,000 or more per share is sound, then Alleghany, owning in excess of 21,000 shares, has after many years of litigation, suddenly given up the ghost and yielded more than $40,000,000—hardly a likelihood in view of the history of events and the sophistication of its financial executives and advisers" (Pages A21 and A29 respectively from appendix of petitioner's original petition for Certiorari October 17, 1973, Cert. 73-663).

A reading of the Staggers Committee Report (supra), the ICC record on the Jones acquisition by Alleghany (supra) plus Alleghany's filed brief with the ICC in October 1973, would reveal why Alleghany did give up the ghost and was anxious to

dispose of its Class B Mo Pac stock in bulk at any price. Essentially it had to do with substantial tax benefits to be derived for Alleghany by avoiding a 70 percent penalty tax if it were firmly considered a motor carrier under the jurisdiction of the Interstate Commerce Commission, rather than an investment corporation under the jurisdiction of the Securities Exchange Commission. In spite of this fact Alleghany still controls Investors Diversified Services which is now the largest mutual fund complex in the United States with assets in excess of $6 billion.[3][4] For the tax benefit interest of Alleghany, the rights of the petitioner and Class B stockholders, supposedly represented by Alleghany, had to be sacrificed.

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[3] One of the primary reasons presented by Alleghany for acquisition of the operating rights of Jones is to lessen its tax burden. Such burden arises from the fact that Allan P. Kirby, as of February 28, 1969, was the beneficial owner of 4,084,813 shares, or 56.21 percent of the outstanding common stock of Alleghany. Alleghany is, therefore, for Federal income tax purposes, considered a personal holding company since one person (less than 5 individuals) owns more than 50 percent of its stock and has "personal holding income," (60 percent or more of adjusted gross income consists of dividends and interest) and is therefore subject to a 70-percent penalty tax on the "undistributed personal holding income." Alleghany does not want to distribute all such income to avoid the tax. With Alleghany the recipient of the operating revenue generated by its Jones Motor Division, it alleges it would be an operating company rather than a holding company for Federal tax purposes. It could then retain and reinvest net earnings and would not be subject to the 70-percent penalty tax. (109 MCC 333, 339)

[4] CHAIRMAN STAFFORD, dissenting: Clearly, Alleghany violated section 5(4) of the act in acquiring the outstanding stock of Jones and Erie without prior Commission approval. While I agree with the majority finding that such a violation will not automatically defeat the transaction, I find nothing in the record to show that overriding public interest warrants its approval. Alleghany's primary purpose in acquiring Jones, and its affiliates, is to lessen its tax burden. The fact that funds conserved by approval of the transaction will be made available for carrier investment by Jones and thus benefit the public indirectly is not what I consider to be of overriding public interest. Jones is a viable, financially sound and well managed corporation and I feel certain that it could continue to adequately serve the public in the future as it has in the past without benefit of Alleghany's tax savings. (109 MCC 333, 356-7)

THIRD: A fair reasonable and legal solution does exist, as proposed by the petitioner below, which would allow Alleghany to dispose of its B stock in bulk at $2,450 per share and leave petitioner and others similarly situated undisturbed in their equity ownership of MO PAC. Alleghany should sell all of its B stock to MO PAC at $2,450.00 per share, which shares would become treasury stock. The Class B stock should be split 20 for 1, leaving the A stock alone giving Mississippi 51.8% voting control and the minority shareholders of the Class A and B Common 48.2% voting control.

This solution is ideal in that it allows for the accomplishment of the legitimate goals of the corporate parties without abusing the property rights of petitioner and other small investors.

The rejection of this proposed solution results in the wrongful taking of other peoples' property for nothing; [B stockholder's equity in MO PAC is reduced from 65.5% to 25.5% under the judgment appealed from]. The question could be raised: was this the intent from the very beginning of the suit below as a class action?

This Case is a Worthy Case for the Courts Consideration

This honorable court has done much to interpret Rule 23 (FRCP) so that large corporate defendants would not be unfairly and unjustly hounded by Class suits.

In the instant case the class suit device has been used to corral innocent and small investors into a box canyon, in order to tie them down by a court judgment. The abuse in this case is that a class suit on several rights, with no Class B interveners permitted after December 20, 1968, started for better dividends, suddenly is switched into a stipulation for recapitalization. The stockholders rights in their stock, which rights were never in jeopardy from the litigation, are now taken away for the benefit of the large corporate stockholder when the Court renders judgment approving the stipulation of recapitalization, as it did so do.

No small investor will be safe if this Court fails to take this case and pronounce some fair and just guidelines as to the proper relationship between the compromise of a class suit and the issues in the litigation.

Conclusion

Petitioner respectfully prays that this Court rehear his petition for a Writ of Certiorari on the following grounds: (1) That by virtue of this Court's recent opinion in *Zahn et al* v. *International Paper Co.* (No. 72-888, argued October 16, 1973, decided December 17, 1973), it is clear that the judgment below could not bind Class B stockholders of Mo Pac whose represented claims did not meet the jurisdictional amount of $10,000.00 exclusive of costs and interests;

(2) That, by recently discovered information Alleghany could not be a proper class representative to stipulate for recapitalization of Mo Pac because, (a) it had a self serving over-riding interest incompatible to the interests of petitioner and others similarly situated, and (b) its stock interests in Mo Pac were under the continuing jurisdiction of the ICC and the ICC was not a party to, nor did it appear in the action below;

(3) That the so called settlement by recapitalization, being so far removed from the issues involved in the original litigation for better dividends, caused the court to lose its adjudicatory power and to make the judgment void; and

(4) That there is a practical reasonable fair solution to the conflicting interests of the parties in this case, which solution avoids the abuse of Rule 23 and avoids the taking of small investors property by big corporations. [Description of the Plan supra p. 9.]

Dated: Brooklyn, N. Y.
January 9th, 1974

Respectfully submitted,

GERARD M. CAREY
Counsel for Petitioner

WILLIAM R. WESSON
Petitioner

Certificate of Counsel

I certify that the within Petition for Rehearing is presented in good faith and not for delay.

Gerard M. Carey
Counsel for Petitioner

Dated: Brooklyn, N. Y.
January 9th, 1974

Certificate of Service

I, GERARD M. CAREY, Counsel to Petitioner, do hereby certify that 3 copies each of the above and foregoing Petition for Rehearing has been deposited in the United States Mail, postage prepaid, on this the 10th day of January, 1974, to the following addressees:

To:

ORANS, EISEN & POLSTEIN, ESQS.
One Rockefeller Plaza
New York, New York

POMERANTZ, LEVY, HAUDEK & BLOCK, ESQS.
295 Madison Avenue
New York, New York
Attorneys for Plaintiff, Levin and LeVasseur

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Gerard M. Carey
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

FEB 19 1974

Gerard M. Carey, Esq.
617 Third Street
Brooklyn, N.Y. 11215

RE: WESSON, ET AL. v. LEVIN, ET AL.,
73-663
USCA2 #73-1864-5

ENTERED
IN OFFICE DOCKET

Dear Sir:

The Court today denied the petition for rehearing in the above-entitled case.

Rec'd by mail
2/21/74
mcwalters

cc:
David W. Peck, Esq.
M. Lauck Walton, Esq.
Abraham L. Pomerantz, Esq.
Sheldon H. Elsen, Esq
Everett I. Willis, Esq.

Clerk
U.S. Court of Appeals for the
Second Circuit
U.S. Courthouse - Foley Square
New York, N.Y. 10007

Very truly yours,

MICHAEL RODAK, JR., Clerk
By
Helen Taylor
Helen Taylor, (Mrs.)
Assistant Clerk

INTERSTATE COMMERCE COMMISSION

SERVICE DATE

DECEMBER 14 '73

Finance Docket No. 27346

MISSOURI PACIFIC RAILROAD CO., SECURITIES

Decided December 6, 1973

Authority granted to Missouri Pacific Railroad Company (a) to issue 1,865,702 shares of no-par $5 cumulative convertible preferred stock, (b) to issue 635,696 shares of no-par common stock, and (c) to reserve and subsequently issue an additional 1,865,702 shares of common stock upon conversion of the preferred stock pursuant to a plan of recapitalization.

M. M. Hennelly, William R. McDowell, Gilbert P. Strelinger, Carroll Neeseman for the applicant.

M. Lauck Walton for Alleghany Corporation, intervener in support of application.

Robert S. Schachter for Oscar Gruss & Son, protestant.

James C. Gabriel, Rollin Gillespie, John Vaiani, William R. Wesson,[1] Labelle Gillespie, Walter Bailey, Virginia Watie, John J. Phillips, and John Gorchester, individual protestants, appearing pro se.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, DEASON and MacFARLAND

TUGGLE, Commissioner:

NATURE OF APPLICATION AND SCOPE

By application filed April 4, 1973, as supplemented June 25, 1973, and July 9, 1973, the Missouri Pacific Railroad Company (MoPac), a common carrier by railroad subject to Part I

[1] Gerard M. Carey, an attorney at law, appeared on behalf of Mr. Wesson but withdrew from the proceeding during the first day of hearing. None of the other individual Class B stockholders was represented by an attorney.

of the Interstate Commerce Act (Act), seeks authority under Section 20a of the Act (1) to issue 1,865,702 shares of new no-par $5 cumulative preferred stock, each share having one vote, initially a stated value of $100 a share, and being convertible one year after the Commission's final order of appr al into new common stock on a share-for-share basis or callable at $100 a share on and after January 1, 1976; (2) to issue 635,696 shares of new no-par common stock, each share having one vote and a stated value of $6.25 per share, and (3) to reserve and subsequently issue an additional 1,865,702 shares of said common stock upon conversion of the preferred. The stated purpose of the issuance of such shares is to effectuate a plan of recapitalization hereinafter described.

PARTIES IN THE PROCEEDING - NOTICE OF HEARING

After due and timely notice to all MoPac stockholders, a hearing on the application was held and briefs filed. At the hearing, 10 Class B stockholders, one former stockholder and Oscar Gruss & Son, a MoPac bondholder, appeared in opposition to the application. Alleghany Corporation intervened in support of the application. No representation with respect to the application was made by any state authority. By order of September 7, 1973, we ordered that because of limitations upon the time available for hearing and decision, the initial decision by the presiding Administrative Law Judge

be omitted as part of the decision-making process herein, and that the record be certified to us for decision when received by the Secretary of the Commission.

PETITION TO REOPEN THE PROCEEDING

On or about October 5, 1973, two weeks after the close of the hearing herein, Archibald Aron filed a petition to reopen the proceeding for the purpose of introducing evidence concerning the voting of his trusteed stock on the plan of recapitalization. It appears that Mr. Aron owns 3,000 shares of Class A MoPac stock and 112 shares of Class B stock in the name of Gage & Co., and that he and his daughter hold 100 shares of Class B stock in the name of the Rhode Island Hospital Trust National Bank and Leo J. Sholes, Trustee. Under date of May 14, 1973, proxies were received by MoPac from Gage & Co., and from the Rhode Island Hospital Trust National Bank authorizing the management proxy committee to vote in favor of the plan of recapitalization. Thereafter, on June 5, 1973, MoPac received two proxies, one each from Gage & Co., and the Rhode Island Hospital Trust National Bank, instructing that the proxies of May 14, 1973 be disregarded and appointing Archiblad Aron as the proxy for both Gage & Co., and Rhode Island Hospital Trust National Bank to vote the shares referred to above. Mr. Aron did not attend the stockholders' meeting and, consequently, did not vote the shares in person. Since the prior proxies of May 14, 1973 had been revoked by the subsequent proxies of June 5, 1973, and since

Mr. Aron did not, in fact, vote the shares under his authority of June 5, no vote was recorded with respect to the shares held by Mr. Aron and his daughter. Thus, the voting record shows, and we think properly, that the shares held by Mr. Aron and his daughter were recorded as not voted either for or against the plan of recapitalization. Whatever his intentions may have been, the fact is that Mr. Aron did not exercise the authority granted him under the proxies of June 5, 1973. Contrary to Mr. Aron's contention, there was no tampering with the voting procedures by MoPac and no deprivation by MoPac of Mr. Aron's rights. He simply chose not to vote. Since the evidence sought to be introduced by Mr. Aron is factually irrelevant, there is no basis for reopening the proceeding. Even if the proposed evidence were to be admitted and considered as a vote against the plan, it would not significantly change the total vote of either class of stock in favor of the plan. Accordingly, the petition to reopen the proceeding is denied.

DESCRIPTION OF MoPac

MoPac is a corporation organized and existing under the laws of the State of Missouri. It operates in Arkansas, Colorado, Illinois, Kansas, Louisiana, Mississippi, Missouri, Nebraska, Okalahoma, Tennessee, and Texas, and through stock ownership, it controls numerous other railroads operating in

the mid-west, south and southwest. Its system, embracing about 12,000 miles of road, extends from Chicago, Ill., on the east, to Pueblo, Col., and El Paso, Tex., on the west, and from Omaha, Neb., on the north, to the Gulf of Mexico, on the south.

PRIOR HISTORY LEADING TO PROPOSED PLAN OF RECAPITALIZATION

In 1956, MoPac was reorganized under Section 77 of the Bankruptcy Act pursuant to a plan of reorganization authorized by this Commission. Missouri Pac. R. R. Reorganization, 290 I.C.C. 477 (1954), approved in In Re Missouri Pac. R. R. 129 F. Supp. 392, (E. D. MO., 1955), affirmed sub nom. Missouri Pac. R. R. 5½% S.S.B.C. v. Thompson, 225 F. 2d 761 (8th Cir. 1955), cert. denied, 350 U.S. 959 (1956). Upon reorganization, MoPac was authorized to issue two classes of stock: Class A and Class B,[2] each share of each class being entitled to one vote. There are presently 1,865,702 shares of Class A stock and 39,731 shares of Class B stock outstanding. Thus, 98 percent of the voting stock is held by Class A stock and 2 percent by Class B stock. Of the total shares outstanding, Mississippi River Corporation (Mississippi) owns approximately 62 percent of MoPac's Class A shares and Alleghany Corporation (Alleghany) owns approximately 53

[2] Class A shares were issued to the former preferred stockholders of the debtor, and Class B shares were issued to the debtor's former common stockholders.

percent of the Class B stock. While Class A stock has power to elect MoPac's Board of Directors and voting control over most other corporate matters, approval by a majority of each class of stock is required with respect to numerous other important corporate actions. See Levin v. Mississippi River Fuel Corp., 386 U. S. 162. As expressly provided by MoPac's present Articles of Association, MoPac may not, without the consent of the holders of record of at least a majority of the shares of Class A stock, and at least a majority of the shares of Class B stock (a) issue any additional shares of stock of any class, (b) create or issue any obligation or security of the company convertible into or exchangeable for shares of stock of the company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of Class A stock or Class B stock, or (d) amend or eliminate any of the foregoing provisions. The Supreme Court of the United States held in Levin v. Mississippi River Fuel Corp., supra, that MoPac may not take any action on matters specified above, including mergers or consolidations, without a class vote and approval thereof by a majority of each class of stock. In effect, Class B stock has veto power over corporate actions referred to above. Over the years, the matter of MoPac's capitalization has been the subject of considerable controversy and litigation. See Levin v. Mississippi River Fuel Corp., supra. Because of Alleghany's majority ownership of Class B stock, it has an independent veto power over any corporate action that requires approval of each class of stock.

In 1967 Alleghany and two individual owners (Betty Levin and Robert LeVasseur) of Class B stock brought a class action suit against MoPac, Mississippi, and 3 directors of MoPac in the United States District Court for the Southern District of New York to compel the payment of higher dividends in past and future years.[3] Other causes of action were alleged, including charges of conspiracy by Mississippi and members of MoPac's Board of Directors to freeze out Class B stockholders and allegations that certain acts of defendants were in violation of the Securities and Exchange Act, Rule 10b-5 thereunder, and of defendants' common law fiduciary duty to Class B stockholders. Plaintiffs Levin and LeVasseur also alleged an assortment of miscellaneous claims. The court noted that several of the complaints contained no request for specific relief, stating that the thrust of all of the complaints dealt with MoPac's dividend policy with respect to Class B stock. Before the issues came on for trial, the parties negotiated a settlement agreement dated December 18, 1972, providing for the recapitalization of MoPac. After analysis and discussion of the terms of the proposed settlement, the court approved the agreement on March 19, 1973, holding that the settlement falls within the range of reasonableness and that

[3] The suit was instituted by Betty Levin and thereafter Alleghany and LeVasseur intervened pursuant to court order. Subsequently, it was ordered that the suit be maintained as a class action on behalf of all Class B stockholders and a number of Class B stockholders intervened.

"it offers a permanent solution to the longstanding impasse between the two contending groups of stockholders - a result that cannot be achieved through successful litigation." Levin et al v. Mississippi River Corporation, et al, 67 Civil 5095, dated March 19, 1973, _____ Fed Supp. _____(S.D.N.Y.) affirmed by the United States Court of Appeals for the Second Circuit in Levin et al and William R. Wesson v. Mississippi River Corporation, et al on June 12, 1973, _____ F. 2d _____(2d Cir. 1973). As set forth in detail hereinafter, the agreement provides for the exchange of each Class A share for one share of new convertible preferred stock, the exchange of each Class B share for 16 shares of new common stock plus $850 in cash and for the acquisition of Alleghany's stock by Mississippi. It provides further that if the recapitalization is not consummated by December 31, 1973, the settlement agreement would be terminable at the option of Alleghany, Mississippi or MoPac.

MoPac's ASSETS AND LIABILITIES

Attached hereto as appendices I and II are general balance sheet data of MoPac as of December 31, 1972 and February 28, 1973. As of February 28, 1973, MoPac's total assets of $1,081,435,692 are composed of current assets of $92.1 million, including cash of $11.5 million, temporary cash investments of $27.8 million, special deposits of $1.04 million, accounts receivable $37.4 million, materials and supplies of

$13.6 million and other current assets of $.7 million; special funds of $6.1 million; investments in affiliated companies of $92.2 million and other investments of $8.1 million; properties less depreciation and amortization of $875.9 million; and other assets and deferred charges of $6.9 million. Liabilities and shareholders' equity are composed of current liabilities of $92.3 million, including accounts and wages payable of $56.3 million, unpaid interest of $.5 million, unpaid dividends of $37,000, unmatured interest accrued of $15.9 million, accrued taxes of $12.1 million, and other current liabilities of $7.3 million; long-term debt of $575.6 million, including $13.2 million due within one year; reserves $12.6 million; other liabilities and deferred credits of $7 million; and shareholders equity of $393.8 million, including capital stock of $190.5; capital surplus of $1.5 million; and retained income of $201.8 million.

It is noted that MoPac's current liabilities are approximately the same as its current assets. It is also noted that MoPac has a substantial capital surplus, considerable cash and temporary cash investments. Given these factors and the carrier's consistent past earnings record, it is apparent that MoPac is in a relatively healthy financial condition and that it has a reasonably favorable margin for future contingencies. In addition, MoPac's debt-equity ratio is favorable.

INCOME AND EXPENSE DATA

MoPac's income and expense data for the year ending December 31, 1972 and for the period January 1 to February 28, 1973, respectively, are shown on Appendix III. For the year ending December 31, 1972, MoPac had railway operating revenue of $451 million, railway operating expenses of $343.8 million, and net revenue from railway operations of $107.2 million. After deducting railway tax accruals, equipment and joint facility rents, its net railway operating income was $38.6 million. Other income was $50.2 million and miscellaneous deductions were $4.7 million; its total fixed charges were $18.4 million; and its income after fixed charges was $26.9 million. Deducting $10.1 million for contingent interest on funded debt, MoPac's net income for the year ending December 31, 1972 was $16.8 million. During the period January 1 to February 28, 1973, MoPac's net income was $2.3 million. From these data and other evidence of record, including annual reports on file in this Commission, it is apparent that over the years MoPac has had a favorable past earnings record.

PRESENT CAPITALIZATION AND SECURITIES

As shown in MoPac's balance sheet as of December 31, 1972, its shareholders' equity totalled $391 million, consisting of capital stock $190.5 million, capital surplus $1.5 million, and retained income $199.4 million. MoPac's capital stock consists of 1,865,702 shares of no-par Class A common stock

and 39,731 shares of no-par Class B common stock, each share of each class having a stated value of $100 a share. Thus, the Class A shares have a total stated value of $186.4 million and the Class B shares, $3.9 million. Dividends on Class A stock are limited to $5 per share in a calendar year and are non-cumulative. Class A stock is nonconvertible, and in the event of dissolution, winding up, or liquidation of MoPac, the holders of Class A stock are entitled to receive $100 per share before distribution can be made to holders of Class B stock, who thereafter are entitled to further distribution without further participation by holders of Class A stock.

No dividends can be paid on Class B stock in any calendar year unless, during that year, dividends of $5 have been paid or set apart for payment on the Class A stock. Except for this, however, there is no limitation on the amount of dividends which may be declared and paid on the Class B stock.

MoPac's funded debt in the principal amount of $456.7 million consists of 5 series of bonds as follows: (1) First Mortgage Bonds, Series B, 4½s due January 1, 1990, $121,202,500; (2) First Mortgage Bonds, Series C, 4½s due January 1, 2005, $126,270,000; (3) General Mortgage Bonds, Series A, 4 3/4s due January 1, 2020, $56,684,700; (4) General Mortgage Bonds, Series B, 4 3/4s due January 1, 2030, $52,572,800, and (5) Income Debentures, 5s due January 1, 2045, $100,015,000. MoPac's First Mortgage bonds of 1990 and 2005 bear interest at 4½ percent, but have a contingent sinking fund. The General

Mortgage bonds of 2020 and 2030 bear contingent interest at 4 3/4 percent, and the Income Debentures bear contingent interest at 5 percent.

Thus, MoPac's capitalization as of December 31, 1972 amounted to $754.1 million, consisting of Class A and Class B stock of $190.5 million, funded debt of $456.7 million, and equipment obligations of $106.9 million.

THE PLAN OF RECAPITALIZATION

MoPac's plan of recapitalization is as follows:

(1) Each share of MoPac's Class A stock, without par value (Class A stock), would be converted into one share of $5 cumulative convertible preferred stock without par value (preferred stock). Each share of preferred stock would be convertible into one share of new common stock without par value (common stock), after one year following the issuance of a final order of this Commission, and would be subject to redemption at the option of MoPac at $100 a share on and after January 1, 1976, and would not be entitled to preemptive rights.

(2) Each share of MoPac's Class B stock without par value (Class B stock) would be converted into 16 shares of new common stock plus a right to receive $850 in cash from MoPac. The new common stock would not be entitled to preemptive rights.

Under the plan and the settlement agreement, Mississippi, which owns a majority of MoPac's Class A stock, is required to make a cash tender offer to Alleghany for at least 400,000 shares of the new common stock at $100 a share, and Alleghany, which owns a majority of MoPac's Class B stock, is required to tender its new common stock to Mississippi. Pursuant to this provision, Mississippi would become the owner of the majority of MoPac's new common stock as well as its preferred stock as a result of the recapitalization. Because of the conversion feature in the new preferred stock, MoPac anticipates that its stock will eventually consist solely of common stock. MoPac proposes to accomplish the plan of recapitalization by an amendment to its Articles of Association pursuant to Missouri Law, Section 388.220, Revised Statutes of Missouri 1969. It seeks no authority from this Commission except authorization under Section 20a to issue the securities referred to above to effectuate the plan of recapitalization.

Upon effectiveness of the amendment to MoPac's Articles of Association, the carrier will be authorized to issue 2,000,000 shares of no par preferred stock, and the 1,865,702 outstanding shares of Class A stock will be converted, one-for-one, into shares of such new Preferred. Later the MoPac's Board will be authorized to issue the authorized but unissued shares of preferred stock at such time or times as it may determine and the Interstate Commerce Commission may approve.

Also, upon effectiveness of the amendment, the carrier will be authorized to issue 3,000,000 shares of common stock and each outstanding share of Class B stock will be converted into 16 shares of common stock plus a right to receive $850 in cash. Initially, 635,696 shares of common stock will be outstanding, 1,865,702 shares will be reserved for conversion of preferred stock and 498,602 will be authorized but unissued and unreserved.

DESCRIPTION OF NEW STOCK

Preferred Stock:

The new preferred stock will be entitled to receive cumulative cash dividends at the rate of $5 per share a year and no more, when and as declared by the Board of Directors, accruing from the date of original issuance of each share. MoPac may redeem the preferred stock, in whole or in part, from time to time after January 1, 1976, at a price of $100 a share plus accrued dividends. After one year following the Commission's approval of the issuance of the new securities and prior to redemption, each share of preferred stock will be convertible into common stock at an initial conversion price of $100 a share of common stock, each share of preferred stock being regarded as equivalent to $100. To protect preferred stockholders against dilution of their conversion rights, the conversion price will be adjusted under a formula that takes into account the price and dividend status of the Class B stock.

In case of liquidation, dissolution or winding up of the affairs of MoPac (mergers, consolidations and transfers of all or any part of MoPac's assets not being included,) holders of the new preferred stock will be entitled to receive $100 per share, plus accrued dividends, before any distribution or payment may be made to holders of the common stock.

As indicated, the new preferred as well as the new common will be entitled to one vote per share and to cumulative voting rights in the election of directors. While dividends on the preferred stock are accumulated and unpaid in an amount equal to or exceeding $7.50 per share, the holders of the preferred stock, voting separately as a class at annual stockholders', meetings will have the right to elect two directors and the holders of the preferred stock and the common stock, voting together as a single class, will have the right to elect the remaining directors. There will be no provision in MoPac's new Articles of Association, after its proposed Amendment becomes effective, or in its By-Laws, for class voting by stockholders. The principal effect of this will be that a class vote will be required only in cases where it is mandatory by state law.

Although not of great significance, another effect of the recapitalization will be that the percentage of total voting shares held by Class A stockholders, who will become owners of the new preferred stock, will be reduced from about 98 percent to approximately 75 percent. This will result because the

present Class B stockholders will receive 16 shares of new common stock for each share of Class B stock outstanding, thereby increasing the percentage of their voting shares. The preferred stockholders will have no preemptive or preferential rights to purchase MoPac securities, and the preferred stock will be fully paid and not liable to assessment.

There are numerous differences between the present Class A stock and the new preferred. For example, the preferred will be convertible into shares of common stock, whereas the Class A stock is not convertible into Class B stock. The preferred will be subject to redemption by MoPac whereas the Class A is not; dividends on the preferred stock will be cumulative, whereas dividends on the Class A stock are not; the preferred will have no preemptive rights, whereas the Class A stock has preemptive rights to purchase additional shares of Class A stock, or securities convertible into, or exchangeable for, Class A stock. As hereinbefore indicated, class voting will no longer be required except to the extent required by state law.

Common Stock:

The new common stock will be entitled to such dividends as may be declared by the Board of Directors out of funds legally available therefor. As long as any preferred stock is outstanding, no dividend (except in common stock) may be paid or declared or any distribution made on the common stock, and no common stock may be purchased, retired or otherwise acquired by MoPac, unless all accrued dividends on the

preferred stock for all preceding periods have been paid and a dividend in the amount of $1.25 per share on the preferred stock in respect of the then current quarter has been paid, or declared and a sum sufficient for the payment thereof set aside, and then only if the net assets of the carrier would be equal to at least $100 for each share of outstanding preferred stock.

In the event of any liquidation, dissolution or winding up of the affairs of the MoPac (mergers, consolidations and transfers of all or any part of MoPac's assets not being included in such terms), holders of the new common stock will be entitled, after payment of $100 per share of preferred stock, plus accrued dividends to the holders of preferred stock, to their pro rata share of the balance, if any, of MoPac's net assets.

Similar to preferred stock, each share of common stock will be entitled to one vote per share and cumulative voting rights in the election of officers. Also, owners of common stock will have no preemptive or preferential rights to purchase MoPac securities and their shares will be fully paid and not liable to assessment. The common stock will not be entitled to any conversion rights and is not subject to redemption.

The major differences between the Class B stock and the new common stock are that the common will have no preemptive rights, whereas the Class B stock has preemptive

rights to purchase additional shares of Class B stock, or securities convertible into, or exchangeable for, Class B stock. As previously stated, the voting rights of holders of the common stock will be different from the voting rights of the Class B stock.

DIVIDEND LIMITATIONS

As is the situation with respect to Class A and Class B stock, dividends on both new stocks will be affected by the provisions of constituent instruments of certain of MoPac's long-term debt which restrict payments of dividends on, and redemptions, purchases and retirements of, the carrier's capital stock. Three of such instruments contain restrictions whereby the carrier is required to designate from what funds and calendar year dividends are being declared. It may not pay dividends out of available net income for any calendar year or out of surplus for any calendar year unless available net income for such calendar year is sufficient to pay contingent charges with respect to such year. Since available net income was so sufficient in all preceding years to pay such charges, at least $83.4 million of the carrier's surplus as of December 31, 1972, on a pro forma basis reflecting consummation of the plan, is unrestricted under such instruments.

STOCKHOLDERS' APPROVAL

MoPac held a special meeting of stockholders on June 15, 1973, for the submission of and voting on the plan of recapitalization and amendment to its Articles of Association.

Prior to the voting, MoPac sent a proxy statement to all stockholders, outlining in detail the nature, scope and effect of the plan. Of the 1,865,702 shares of MoPac's outstanding Class A stock, 1,614,453 shares, or 86.5 percent of such shares outstanding, were voted in favor of the plan and amendment, and of the 39,731 shares of MoPac's outstanding shares of Class B stock, 33,148 shares, or 83.4 percent of the amount of such shares outstanding, voted in favor of the plan and amendment.

The shares present and voting in each class not owned by Mississippi or Alleghany were 474,902 shares of Class A stock and 14,062 shares of Class B stock, and of said minority Class A shares, 453,858 shares, or 95.5 percent of those present and voting, voted for the plan and amendment, and of the total 14,062 shares of Class B stock, present and voting, 11,905 shares of such Class B stock, or 84.7 percent of those present and voting, voted in favor of such plan and amendment.

In connection with stockholders' approval, MoPac felt that a vote of a majority of each class of stock would be sufficient under the law to warrant approval of the plan. Nevertheless, its Board of Directors determined that, because of the importance of the plan and the disparity of the interests of the stockholders in the matter, the plan would not be implemented unless it was approved by (a) the holders of 75 percent of the outstanding shares of the Class A stock,

including a majority of the shares of Class A stock voted (other than shares owned beneficially by Mississippi River or Alleghany) and (b) the holders of 75 percent of the outstanding shares of Class B stock, including a majority of the shares of Class B stock voted (other than shares of Class B owned beneficially by Mississippi or Alleghany). It is clear that the voting in favor of the plan exceeded that required by MoPac's Board of Directors in that a majority (more than 75 percent) of each class of stock as well as a majority of the minority holders of each class of stock voted to approve the plan. Also, the vote of approval here exceeds the mandate of the Commission in Missouri Pac. R.R. Co. Reorganization, 290 ICC 477, 493, requiring the "consent of at least a majority of the number of shares of common stock of each Class at the time outstanding" as a prerequisite to the alteration of the rights of holders of either class of stock, or the authorization of additional shares of either class or any other class. It is our view that the stockholders' vote of approval of the plan complies with the applicable federal law and MoPac's Articles of Association.

ESTIMATED EXPENSES OF THE PROCEEDINGS

MoPac estimates that the expenses to be incurred in connection with this proceeding and the disposition and exchange of securities will be $87,500, consisting of legal and accounting expenses, expenses of the stockholders' vote, costs of printing stock certificates, expenses of an exchange agent,

and other miscellaneous expenses. The largest item of expense, which is estimated to be $50,000, is related to the vote of the stockholders. In view of the importance of proposed recapitalization and the complexity of the matters involved, we believe that the expenses of the proceeding are reasonable.

TOTAL CAPITALIZATION UNDER THE PLAN

Under MoPac's proposal, the new preferred no-par shares will have a stated value of $100 a share and the new common will have a stated value of $6.25 a share. The total stated value of the 1,865,702 shares of preferred will be $186,570,200, and the stated value of 635,696 new common shares will be $3,973,100. Thus, the total capital stock account of MoPac will be $190.5 million, the same as under MoPac's present stock structure. MoPac's present corporate surplus is $165,668,000, and while the surplus will not be affected by the issuance of new stock to replace present Class A and Class B stock, the $850 a share payment to Class B stockholders, totalling $33,771,350 will be charged to surplus. The present corporate surplus is adequate to cover that charge.

Giving pro forma effect to the recapitalization and on the basis of debt as of June 30, 1973, the capitalization of MoPac under its proposed plan would be $566.9 million debt, $190.5 million stock, or a total capitalization of $757.4

million. Such capitalization would be generally similar to the present capitalization and would produce a favorable debt to equity ratio.

MoPac's PURCHASES OF OTHER RAILROAD SECURITIES

Because of the class vote conflict, MoPac, in recent years, has been unable to enter into successful merger agreements with other railroads. In order to maintain a healthy growth in competition with the rest of the industry, MoPac has invested substantial amounts in the securities of other railroads over the past several years. Beginning in 1960, MoPac has expended $79 million in the purchase of securities of other railroads and has sold approximately $25 million worth of these securities, leaving a balance of approximately $54 million invested in the securities of other carriers. Following is a summary of MoPac's purchases of securities in other carriers during the period 1960-1963:

(1960 - 1963)

Amount Invested	Railroad	Ownership
$ 9,360,599	Texas & Pacific Ry.	96.6
22,054,321	Chicago & Eastern Ill. R.R.	72.8
6,718,600	Missouri-Ill. R.R.	99.9
8,000,000	Alton & Southern R.R.	50
33,663,764	Santa Fe Industries	*
$79,797,284		
(25,705,656)	Proceeds of Sale of Santa Fe Debentures	
$54,091,628		

* $7,958,108 Principal Amount of 6-1/4% Santa Fe Convertible Debentures

ANALYSIS AND SUPPORT OF THE PLAN

Mr. John C. Burns, Vice President of Finance of Alleghany, formerly a partner in the New York Securities Co., and a specialist in transportation securities, analyzed the plan in terms of economic value for Alleghany and offered testimony as to the overall fairness of the plan. Using a two-fold approach, Witness Burns determined the present and prospective worth of MoPac, and evaluated the proposal in the light of those factors. Since MoPac has two classes of stock, he allocated the carrier's total worth between Class A and Class B stock.

Witness Burns determined the worth of MoPac by multiplying its present earnings by a price-earnings multiple appropriate for securities of a railroad such as MoPac. He used MoPac's earnings of $25,000,000 in 1971 and $27,000,000 in 1972, and for comparitive purposes selected the Southern Railway and the St. Louis and San Francisco Railroad, as the two railroads most nearly comparable to the Missouri Pacific, pointing out that they were selling at a price-earnings ratio of 8:1. Using the multiple of 8, he estimated that MoPac would be valued at $200,000,000 to $216,000,000. However, he concluded that a multiple of 9 would more appropriately reflect the average multiple over a longer term for sound railroad securities, and the use of that multiple would result in a value of $225,000,000 to $238,000,000. Applying other favorable factors, such as

good management, traffic, geographical location and the excellent debt structure, he estimated the present value of the equity to be from $240,000,000 to $250,000,000.

Allocating this value between Class A and Class B stock, Witness Burns used the market price for Class A before settlement rather than the current market price. Using the range of $70 to $75 per share, he concluded that the Class A stock would have an aggregate market value of $130,000,000 to $140,000,000, leaving a value for the Class B stock of $100,000,000 to $120,000,000 million.

On a present worth basis he valued the $850/16 share offer, embodied in the plan of recapitalization, at $2412 to $2457 per share of Class B stock. Witness Burns stated, however, that if Mississippi accepted all of the stock tendered, the offer would be worth $2450, in that the 16 shares would be worth $100 each. Assuming all of the shares of new common stock are tendered to Mississippi but that Mississippi takes only the minimum that it is required to take, namely, 400,000 shares, Alleghany would continue to hold 5.9 shares of common for each share of Class B stock previously owned by it, or a little more than 125,000 shares. MoPac would then have outstanding 1.864 million shares of convertible preferred and 640,000 shares of common, but since the preferred is callable at $100 a share and convertible into common one year after issuance, and since MoPac expects to pay a dividend of $5.00 on both common and preferred, Witness Burns

concluded that the value of the new common and the new convertible preferred would be essentially the same.

At the earnings used to evaluate the entire corporation ($25-$27 million), these 2.4 million shares would earn $10.40 to $11.25 each. At 9 times earnings they would sell at $93-5/8 to $101-1/4. Multiplying these amounts by the 5.9 shares hereinbefore mentioned, and adding the remaining shares at $100 per share to the $850 cash consideration would result in a value of $2412 to $2457.

Witness Burns used another method of valuation to determine MoPac's prospective value discounted to current realization. Using the discounted prospective value method, he arrived at a fair market value of $90 million to $100 million for Class B stock. In reaching this conclusion, he considered the prospective earnings which could be realized by traffic growth, internal reorganization and other economies, giving great weight to the value of MoPac in a possible merger, and some weight to going concern value and book value as they might influence an appraisal should MoPac become nationalized.

He used 1977 as a prospective future year on the ground that predicted economies, possible mergers or nationalization could not be expected to be fully effectuated in less than four years. While he stated the $97 million offer ($2450 per Class B share) was on the low side of present worth, it

was higher than the value of MoPac in 1977 discounted to current value. Witness Burns felt that there was no likelihood of obtaining a sufficiently higher price for the Class B stock in 1977 to compensate Alleghany or other Class B holders for holding the security for four more years. Witness Burns concluded that both on a present value and a prospective value discounted basis, the offer of $850 and 16 shares of common stock for each share of Class B stock was adequate consideration. In his opinion, the value of the offer is approximately $2450 per share, and this price reflects the approximate true economic value per share at the time of his analysis.

The First Boston Corporation,[4] through its Vice President and senior railroad analyst, Mr. F. Lee Jones, acting independently of the parties in the settlement agreement, evaluated the plan and stated that it was fair and reasonable for both classes of stockholders and beneficial to MoPac. Witness Jones supported the capitalized earnings method used by Witness Burns as a proper method in the evaluation of MoPac's stock. Using essentially the same data as Witness Burns, Witness Jones determined that on MoPac's 1971 and 1972 earnings, the value of Class B stock ranged from $2,139 to $2,592 per share on an average of $2,365 per share, a value within the range of Mr. Burns' evaluation.

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[4] The First Boston Corporation, which deals in corporate and Government securities, has acted as financial adviser in connection with a number of railroad mergers in recent years.

Miss Isabel H. Benham, a specialist in transportation, finance and railroad securities, and First Vice-President of Shearson, Hamill & Co., Inc., investment bankers and security dealers, made a detailed statistical analysis of the plan and concluded that the plan was in the best interests of both classes of stockholders and MoPac. In reaching this conclusion, Witness Benham reviewed and analyzed a wide range of statistical data, including the complete financial history of MoPac, its capitalization, earning power, MoPac's past dividend policy, its annual reports, and various other statistical studies. Appendixes IV through IX contain the data from which her conconclusions are drawn.

REASONABLENESS AS TO CLASS B STOCK:

Among other things, Witness Benham offered an exhibit, Appendix IV hereof, showing the "Computation and Application of Available Net Income," as required by MoPac's mortgages and indentures, and allocating earnings after fixed charges to (1) a Capital Fund; (2) First Mortgage Sinking Fund; (3) interest on General Mortgage Series A bonds and applicable Sinking Fund; (4) interest on General Mortgage Series B bonds and applicable Sinking Fund; and (5) interest on Debenture bonds. She explained that dividends on the equities may not be paid out of "Available Net Income" or out of surplus for any calendar year unless "Available Net Income" for the calendar year is sufficient to pay the foregoing contingent charges, and arrearages, if any, have been made up. She then defined "Available Net Income" as the income of MoPac consolidated with its wholly-owned railroad subsidiaries after taxes

and fixed charges, calculated on the basis of Interstate Commerce Commission accounting practices. From these data, it was demonstrated that in the period 1963-1972 (inclusive) the "balance remaining" as determined on an Interstate Commerce Commission basis was sufficient to cover the $9.3 million dividend on the Class A stock in each year with the exception of 1971. However, if generally accepted accounting principles had been in effect during this period, dividends on the Class A stock would have been earned under the formula in only three of the last ten years and nothing would have been available for the Class B stock in seven of the last ten years.

Appendix V compares balance available for dividends, dividends actually paid on Class A stock each year, the balance available for Class B stock and dividends paid on Class B stock for each of the years 1956-1972 (inclusive). Over the 17-year period, earnings available for dividends totalled $193.9 million, while dividend payments on the Class A stock totalled $123.7 million or about 63.78 percent of the total. In view of this, Witness Benham represents that the Class A stockholders should be allocated 63.78 percent of the new share capitalization. With 1,864,352 shares of Class A stock outstanding, this would result in a new share capitalization of 2,923,098 shares (1,864,352 divided by 63.78 percent, and would roughly approximate the 3,000,000 shares proposed under the plan. Of this total share capitalization, the Class A would be entitled to 1,864,352 shares (one-for-one), but

to provide for some flexibility, 2,000,000 shares have been authorized under the plan for the new preferred stock, leaving a balance of 1,000,000 shares for Class B shares or, assuming a value of $100 for each share, $100,000,000.

In the 1964-1972 period, Class B shareholders have received $1.8 million in dividends, and MoPac proposes to pay Class B stockholders $33.8 million ($850 per share), or total payments to Class B stock of $35.6 million. Subtracting this sum from the balance available for Class B stock leaves $64.4 million to be satisfied with stock, or about 644,000 shares or 16.2 shares for each Class B share, which approximates the 635,696 shares or 16 shares per Class B share proposed under the plan. Witness Benham indicated that these data support the conclusion that Class B stockholders have been fairly and equitably treated in the plan particularly in respect to the share allocation. Appendix VI hereto contains the supporting data and the details of these calculations.

Also, Witness Benham testified that the agreed-upon payment to the Class B shareholders of $33.8 million in cash is justified. Appendix VII hereto shows the number of Class A shares outstanding at the end of each year, the total amount of dividends if $5 had been paid on Class A shares outstanding each year; and actual dividend payments. Appendix VII shows that, if the $5 dividend had been paid in each of the last 17 years, total payments would

have been $158.2 million. Subtracting this sum from the cumulative "available" earnings of $193.9 million would leave a balance for Class B stock of $35.7 million. Since Class B shareholders have already received dividends totalling $1.8 million, $33.9 million would remain for Class B stockholders, which is the approximate amount that they will receive in cash under the plan. However, Witness Benham asserts, there is no justification for a greater cash payment to Class B shareholders because available earnings not paid to Class A shareholders were required for the property.

Summarized, Witness Benham's testimony as to Class B shareholders is that their treatment under the proposed plan is justified on the basis of the development of the share capitalization previously outlined. The one-time cash payment gives Class B stockholders approximately the amount of available cash contributed to the surplus account after payments to Class A stock. Other benefits accruing to the Class B stock under the plan include the opportunity for representation on the Board of Directors, the prospect for greater annual dividends, a broader market for the new shares because of the enlarged number of shares, and the alliance of the interests of the Class B stockholders with those of Mississippi, the majority holder of preferred stock, which will also have substantial holdings of common.

REASONABLENESS AS TO CLASS A STOCKHOLDERS:

Witness Benham's testimony, as documented in appendix VII hereto, shows that Class A stockholders have been paid a total of $123.7 million in dividends over the last 17 years, but if the

full $5 per share dividend had been paid in each of these years, a total of $158.2 million would have been paid out. Stated differently, the contribution to earned surplus of $35.7 million results from the fact that Class A stock was not paid the full $5 dividend in the early years of MoPac. Since the MoPac's capital structure is being modified and the Class A stock is the senior equity, some recognition should be given to the Class A stock for the difference between actual dividends received and total dividend requirements on the stock. Nevertheless, Witness Benham believes that the plan is fair to the Class A shareholders because they will receive a somewhat better security. For example, they will receive a conventional type of preferred stock rather than a hybrid, and the new preferred will be convertible with cumulative dividends.

The Class A stockholders who receive on a share-for-share basis a new 5 percent cumulative preferred stock will have their position strengthened and will have a convertible privilege. Under the plan, the veto power of Class B stock will be eliminated by the alliance of the interests of the holders of the new preferred with those of Mississippi, the majority holder of the common.

While the old Class A stock was a non-cumulative preference stock, it was able to receive dividends out of retained earnings in years in which current earnings were insufficient to cover dividends. However, the new preferred stock will have a cumulative

dividend feature which assures payment of a $5 dividend before any dividends are payable on the common stock. Moreover, Witness Benham states, the new preferred stock should command a better market than the hybrid Class A stock because it is convertible into common stock, and in the present market environment, convertible preferred issues should be more attractive to tax-paying institutional investors.

BENEFIT TO MoPac:

According to Witness Benham, the plan is in the best interest of MoPac. The plan of recapitalization will eliminate the class vote and dividend conflicts between the Class A and B stockholders, which is beneficial to MoPac and all of its stockholders. Both Class A and Class B have one vote per share, and under the plan, the new preferred and common will each have one vote per share. Though the Class A presently has voting control of elections to the Board, it does not, as previously indicated, have unlimited control over major corporate decisions such as mergers or consolidations. On the other hand, the present Class B stock, even though it has one vote per share, has insufficient voting strength to elect a director, and so it, too, lacks control over major corporate decisions. As indicated before, MoPac may not, without the consent of a majority of the outstanding shares of each class of its stock, merge or consolidate its properties. The recapitalization and tender offer will give Mississippi a majority of the new common as well as a majority of the new preferred. Thus, the interests of Mississippi,

the majority holder of both preferred and common will be allied on matters of mergers and consolidations and on matters of dividends with those of the other holders of the preferred and common. The plan thus will remove the dividend and class vote conflicts, will materially strengthen the position of MoPac with respect to mergers and consolidations, and will give management greater flexibility in policy decisions.

EARNINGS POTENTIAL FOR THE NEW COMMON STOCK:

Appendix VIII hereof shows on a pro forma basis earnings per share of new common stock after preferred dividends and earnings per share on a fully diluted basis, all before extraordinary charges. A recapitulation of this data is set forth below:

	Earnings per Share of New Common		Earnings per Share Fully Diluted	
	ICC BASIS	GAAP BASIS	ICC BASIS	GAAP BASIS
1972.....	$27.98	$11.50	$10.84	$6.65
1971.....	25.86	13.82	10.31	7.24
1970.....	19.71	3.84	8.74	4.70
1969.....	18.82	7.58	8.51	5.66
1968.....	15.52	3.71	7.67	4.67
3 Yr. av. 1970-72	24.52	9.72	9.96	6.20
5 Yr. av. 1968-72	21.58	8.09	9.22	5.79

Witness Benham states that the indicated dividend rate of $5 per share on the new common would have been earned on an Interstate Commerce Commission basis in each of the last five years both on the new shares to be issued and after full dilution. On the basis of generally accepted accounting principles, earnings on the new shares to be issued and after full dilution would have averaged over $5 in the last three and five-year periods. Since each share of Class B stock is to receive 16 shares of new common, the payment, on a $5

dividend basis, would be equivalent to an $80 dividend on the old Class B stock, which is a substantially higher dividend than could have been expected on the Class B stock.

EARNINGS POTENTIAL OF THE NEW PREFERRED STOCK:

Appendix IX shows on a pro forma basis what earnings coverage through the new preferred dividend would have been in recent years; it would have ranged from 1.23x to 1.37x in the last five years and would have averaged 1.33x in the most recent three-year period. Witness Benham states that MoPac's earnings protection for the senior equity will not be altered by the plan of recapitalization.

Based upon the foregoing statistical data, it was the conclusion of Witness Benham that the proposed solution of the long drawn-out controversy between the two classes of MoPac stockholders was in the best interests of MoPac and each class of its stockholders.

CLASS B STOCKHOLDERS' EVIDENCE

Ten Class B shareholders owning some 289 shares of Class B stock appeared at the hearing in opposition to the proposed plan, and offered testimony to the effect that the plan is unfair. Their testimony was generally similar in substance and in tenor. Most of them participated in the cross-examination of applicant's witnesses, and filed briefs. Mr. James C. Gabriel, though present during most of the hearing, failed to appear for his scheduled testimony on the final day of hearing. However, Mr. Gabriel was sworn at the beginning of the hearing, and many of his statements,

despite objections by MoPac and Alleghany, are matters of record. Since there are a total of some 922 corporate and individual Class B shareholders, we note that the number appearing at the hearing in opposition to the plan represents about 1 percent of the Class B shareholders. Also to be noted is the fact that the total number of Class B shares represented at the hearing constituted less than 1 percent of the Class B shares outstanding. The major thrust of their evidence is that the value of Class B shares is to be measured by book or equity value and that under this method, the consideration to be given for their shares is inadequate. Some of the Class B stockholders assert, and it is not disputed, that should the new preferred shares be converted into new common, as contemplated in the plan, the equity position of the Class B stockholders would be reduced from 61½ percent to 25½ percent. The evidence of the Class B shareholders is summarized below.

Labelle Gillespie originally purchased 800 shares of MoPac common stock, which as the result of the reorganization became 40 shares of Class B stock. She now owns 40 shares of Class B. Although her original investment in the stock was something in the neighborhood of $2,000, she concedes that her 40 shares are now worth $98,000 under the plan. Although Witness Gillespie does not consider herself to be a sophisticated investor, she indicated that she had made other successful investments as a short-term, in-and-out trader and speculator; she stated that she understood the proxy statement without assistance, that she

voted against the plan, and that her vote was properly recorded. Among other things Witness Gillespie asserts that the recapitalization plan is "clearly illegal, on grounds of congenital defect as to origin of recapitalization containing internal merger; second, illegal on grounds of conspiracy to defraud; third, fraudulent in text and effect, in abuse of high office, and in misapplication of law; fourth, completely unfair, unnecessary, undesirable, and a calamity; fifth, an absolute failure as answer to the original plea made in the court in an effort to obtain better treatment as to dividends." She contends that Federal "law clearly states that reorganization and merger proposals must originate by request of the groups of stockholders themselves, and cannot originate by court order, Fiat, or court request," and that "the proposed plan," not having been requested by Class B stockholders, "may not be brought before the Commission for judgment, for it is already null and void." She states that the plan does not settle the dividend problem for Class B stockholder; she requests the Commission to "veto the plan," and in lieu thereof, require a 95 to 1 split on Class B stock so as to "return voting control rightly to where it belongs." Witness Gillespie further states that "at best, Class B in accepting the new shares, reduces its equity to about half of its present retained income, and if it sells the shares to MRC it will be cashed out of the company for slightly more than a fourth its claim shown in the last annual report." Although Witness Gillespie complained of wrongdoing on the part of the court which approved the plan, as well as

by officers and directors of MoPac, she admitted that she had no personal knowledge of any acts or conduct that would support such charges.

Mr. Rollin W. Gillespie, a retired space scientist, owns 15 shares of Class B which he purchased prior to 1950 for $6,500. The value of his stock under the plan would be $36,750. Mr. Gillespie offered a statement for the record, in which he states, among other things, that the proposed plan "unfairly transfers approximately $200 million in Class B equity along with corresponding earnings potential to Class A shareholders; he urges that as an alternative plan, the Class B shares be split on the basis of 95 to 1. He made numerous complaints against officers and directors of MoPac and Mississippi, charging fraud, conspiracy, or deceit but indicated that his opinions were derived entirely from matters of public record and that he has no personal knowledge of any acts of misconduct on their part. He feels that the plan is unfair to Class B stockholders because, among other things, the equity value of one share of Class B stock as of December 31, 1972, was $8,926 per share, as compared with the $2,450 which each share of Class B stock would be entitled to under the plan of recapitalization.

To show the equity per share and earnings per share of each class of stock before and after the proposed recapitalization, Mr. Gillespie submitted the following summary:

Class A equity per share:

Before	$ 100.00
After	$ 202.93

Class A annual earnings per share:

Before	$ 5.00
After	$ 10.84

Class B equity per share:

Before	$8926.78
After	$3246.68 plus $850.00 cash

Class B annual earnings per share:

Before	$ 447.66
After	$ 173.44

Witness Gillespie calculated the total transfer of equity as follows:

Equity of present 39,731 shares Class B	
39,731 x $8926.78 =	$354,669,896
Less cash paid to 21,243 shares Class B	
21,243 x $2450.00 =	$ 52,045,350
Less equity retained by 18,488 shares Class B	
18,488 x $4096.88 =	$ 75,743,117
Gain in equity held by Class A shareholders	$226,881,429
Less cost to Mississippi Class A shareholders	
21,243 x $1600.00 =	$ 33,988,800
Net gain to Class A shareholders	$192,892,629
Net loss to Class B shareholders	$192,892,629

Mr. William Wesson, a stockbroker and a registered representative, owns 75 shares of Class B stock in his own name, 10 in a trust, and has an interest in 14 shares owned by an investment group. Of the latter shares, he stated initially that they were voted incorrectly, but upon being confronted with a proxy authenticated by an official in his brokerage firm, he conceded that the stock was counted by MoPac exactly as instructed on the proxy, and that all other shares of which he had personal knowledge had been counted exactly as voted. In addition to statements made by other Class B shareholders, Witness Wesson made specific assertions that the proxy statement was misleading. As a stockbroker, Mr. Wesson's recollection of when he acquired his stock and at what price was somewhat vague. However, he conceded that his average cost was less than $2,000 per share. Although Witness Wesson conceded that unanimity is not required for a recapitalization, he asserts, as did other Class B shareholders, that this recapitalization cannot be accomplished because of a "congenital defect" apparently because the recapitalization was approved as a compromise settlement by the District Court. Among other things, Witness Wesson restated the proposition that upon full conversion of the new preferred stock into common stock, the equity of Class B shareholders will be reduced from about 61 percent to 25 percent; he also stated that under the Commission's 1954 plan of reorganization, the Class B stock is entitled to participate in any future prosperity that MoPac may enjoy, that based on retained earnings the value per share of Class B stock is $9,000

and the long range value is $25,000, that under the 1954 reorganization plan, Class B stockholders are entitled to receive the economic equivalent of the rights they surrender, and that the plan, if effectuated, will constitute an unconstitutional taking of the Class B stockholders' equity.

As an alternative to the proposed plan of recapitalization, Witness Wesson presented a proposal which would not change the equity of either class of stock. He proposes that Alleghany sell its 21,243 shares of Class B stock to MoPac for $2,450 a share, that MoPac hold such shares as treasury stock for future corporate purposes, that the Class B stock be split 20 for 1, and that the Class A stock remain the same. The result of his plan, Witness Wesson asserts, would be to give Mississippi 51.8 percent of voting control and the minority stockholders of Class A and B 48.2 percent voting control. Witness Wesson asserts that the advantages of his plan are (1) the equity of the shares would remain undisturbed, (2) MoPac would realize a gain because it would acquire 21,243 shares, presently valued at $9,000 a share, at a cost of $2,450 per share, (3) MoPac could eliminate dollar-waste because it would not have to pay out the $33,771,350 (39,731 shares times $850), (4) Alleghany would own no stock, (5) Mississippi would maintain voting control, (6) that MoPac would have 424,860 shares of Class B stock in its treasury for mergers and other corporate actions, (7) the 20 to 1 split for Class B stock would repair an old injury to Class B stockholders growing out of

the 1954 reorganization plan, and (8) the plan would provide more balanced voting control and should increase the performance of fiduciary obligations on the part of MoPac's Board of Directors.

Also, Witness Wesson complained of errors by the Commission with respect to the 1954 plan of reorganization and he seeks redress in this proceeding. He states further that over the years there have been "numerous acts of denegation, denigration, and conspiracy" on the part of directorates of MoPac and Mississippi, but conceded on cross-examination that he had no personal knowledge of any wrongdoing on their part. Witness Wesson complained that the proxy statement sent to stockholders prior to voting on the plan was misleading, and indicated that he had made a similar complaint in writing to the Securities and Exchange Commission, his particular complaint being that the proxy statement did not fully reveal the fact that the equity of Class B stockholders would be reduced. On cross-examination, however, Mr. Wesson conceded that the Securities and Exchange Commission responded to his letter in writing and advised him that the proxy statement included all material information necessary for the exercise of prudent judgment.

Mr. John Charles Vaiani, a registered representative of a brokerage house, owns 12 shares of Class B stock for which he paid an average price of $1,145 per share. He voted against the plan, and his vote was properly recorded. He has never recommended the purchase of Class B stock to his customers because he considered it too speculative. Witness Vaiani's testimony covered a broad

range of topics similar to that of other Class B shareholders. Among other things, he stated that the Class B shareholders who voted for the plan did so under a misrepresentation of fact, that the plan is based on "court fiat," that it destroys the integrity, character and legal rights of Class B stockholders, that the plan violates the 1954 reorganization plan approved by the Commission and the Federal courts, that the value of one share of Class B stock is now worth over $8,900 in retained earnings, and if the plan is approved, it will violate the due process clause of the Constitution. He complained that the value of land owned by MoPac was understated and made allegations of misconduct on the part of MoPac and its Board of Directors, making specific reference to MoPac's annual reports to stockholders relating to the value of Class B stock and earnings per share. Also, Mr. Vaiani complained about improprieties in the proxy statement and has made similar complaints to the Securities and Exchange Commission.

As an alternative to the proposed plan, Mr. Vaiani requested that MoPac's present capitalization be changed by splitting Class B stock on the basis of 89 to 1, restoring Class B stock voting strength in proportion to retained earnings and provide it with the representation it needs on MoPac's Board of Directors.

Mr. John J. Phillips, Jr., owns 3 shares of Class B stock which he voted for the plan. He spent about 8 hours reviewing the court files in the Levin dividend suit and has no personal

knowledge of any wrongdoing by MoPac except the impression he derived from those files and other matters of public record. Though Mr. Phillips felt that he would suffer a loss on his shares under the plan, he conceded that the purchase price of his stock ranged from a low of $760 to a high of $1,150 a share. Mr. Phillips stated that if there was any practical alternative to the plan, he would not have agreed to it; he feels that he was mislead; that full disclosure was neither attempted nor accomplished, and further that his vote in favor of the plan should be treated as null and void.

Summarized, the position of the Class B stockholders throughout the hearing and on brief is (1) that the 1956 plan of reorganization created an "immutable" contract with the Class B stockholders which cannot be altered over the dissent of a single shareholder; (2) that each Class B shareholder is entitled to receive book value for his shares; (3) that the Levin dividend suit was based on a claim for dividends and that it was "illegally changed" to a suit for recapitalization, resulting in a "congenital defect" which precludes approval; (4) that in the 1956 reorganization this Commission deprived the Class B stockholders of $130,000,000 in book value, (5) that the proxy card and proxy statement were false and misleading; (6) that improprieties were committed by MoPac and Mississippi and their Boards of Directors depriving them of better dividends and depressing the value of their stock; (7) that all of the matters complained of were accomplished by conspiracy, fraud and deceit on

the part of MoPac and Mississippi and their Boards of Directors; and (8) that the plan is unconstitutional in that Class B shareholders will receive less than what they are required to surrender.

Some of the Class B shareholders complained that they had no legal counsel and could not afford it; they asserted that Class A shareholders were being represented by MoPac's counsel at no cost to them and apparently because of this, they felt that the Commission should either furnish them with counsel or direct MoPac to pay their attorney's fees. Also, some of the Class B shareholders requested the Commission to determine that the proceeding is within the language and spirit of section 20b and that appropriate findings thereunder be made.

Oscar Gruss & Son (Gruss), a holder of $154,000 face amount of MoPac's 4-3/4 percent Series A general Income Bonds, $83,500 face amount of 4-3/4 percent Series B General Income Bonds and $1,246,300 face amount of 5 percent debentures. Though presenting no evidence at the hearing, Gruss filed objections (brief) objecting to the proposed plan. Among other things, Gruss contends that the plan involves a conspiracy between the controlling Class A and Class B shareholders by which they plan to materially enrich themselves at the expense of the holders of senior debt securities; that the plan is unfair to the holders of General Income Bonds and Debentures; and that it violates the plan of MoPac's reorganization approved by the Commission in 1954 and the indentures under which such securities were issued.

The Gruss brief characterizes the plan as a business deal designed to enrich Mississippi and Alleghany to the detriment of MoPac and to the holders of its debt securities. Further, Gruss contends that the payment of $850 for each share of Class B stock, as proposed, is nothing more than a payment of back dividends, and it questions the propriety of the payment through borrowing or from income or surplus. Also, Gruss believes that the plan, if effectuated, will present the possibility of creating a holding company to which non-railroad assets could be transferred, thereby jeopardizing the rights of holders of debt securities. In view of the above, Gruss requests us to deny the application or in the alternative, to impose the following conditions and restrictions:

(1) Establish an adequate sinking fund for the Income Debentures.

(2) Prohibit redemption of stock while any Income Bonds or Debentures are outstanding.

(3) Provide that the Income Bonds and Debentures should be called on a lot basis before borrowed funds are paid to Class B stockholders as a dividend.

(4) Place restrictions on Mississippi to effect major changes to the detriment of the Bondholders.

(5) Place restrictions on the payment of dividends while Income Bonds and Debentures are outstanding.

(6) Change the Income Bonds and Debentures to fixed interest bonds.

(7) The Interstate Commerce Commission should fully investigate the proposed recapitalization, its effect on MoPac and on the bondholders and its effect on the 1956 plan of reorganization, and require such other provisions as it may deem appropriate.

DISCUSSION AND CONCLUSIONS

A threshold issue to be determined in this proceeding is whether the application is subject to the provisions of section 20b of the Act, known as the Mahaffie Act. The question arises because of a Commission order of August 13, 1973 (requiring MoPac to give notice of hearing to stockholders), which indicated that the plan involves the modification of MoPac's financial structure and the alteration or modification of securities within the purview of section 20b. Some of the Class B shareholders contend that the proceeding comes within section 20b. MoPac argues that it does not, asserting that it can legally effect the plan of recapitalization by an amendment to its Articles of Association pursuant to the law of Missouri.

Section 20b(1) provides in part that it shall be lawful with the approval and authorization of the Commission for a carrier to alter or modify any provision of any class or classes of its securities. Section 20b(7) provides that the provisions of section 20b "are permissive and not mandatory, and shall not require any carrier to obtain authorization and approval of the Commission hereunder for the making of any alterations or modification of any provision of any of its securities or of any class

thereof or of any provision of any mortgage, indenture, deed of trust, corporate charter, or other instrument, which it may be able lawfully to make in any other manner, whether by reason of provisions for the making of such alteration or modification in any such mortgage, indenture, deed of trust, corporate charter, or other instrument, or otherwise: ..." 49 U.S.C. §20b(7) (Emphasis supplied).

The language of section 20b(7) is plain and unequivocal. In effect, if states that a carrier need not seek Commission approval to modify its financial structure or alter any provision of its securities if it can do so by any other lawful manner. Section 20b(7) thus permits a carrier to elect to proceed under section 20b or to accomplish the modification of its securities in any other lawful manner but provides that section 20a will continue to be applicable. Section 20b recognizes that a carrier may alter its securities in a lawful manner by reason of the specific provision of section 20b(7). While stock is not specifically mentioned in section 20b(7), a share of stock is a security and is therefore within the scope of the permissive language of section 20b(7). The use of the phrase "corporate charter" in section 20b(7) can only refer to stock and thus it is clear that Congress intended to include the reorganization of stock within the language of that section. If there is any doubt in the matter, that doubt is dispelled by the legislative history of section 20b. In this connection, attention is invited to the following statement of Congressman Wolverton, House Manager for H.R. 2298, which became section 20b:

> "The amendments made to the bill as it passed the House are fully acceptable to your conferees. They broaden the coverage provided by the House to include a permissive procedure for voluntary reorganization of stocks as well as bonds, and use of this procedure by railroads now in bankruptcy proceedings. This use, however, ... is permissive and not mandatory ..." 94 Cong. Rec. 3500 (1948). [Emphasis supplied]

Thus, it seems clear that the language of section 20b(7) as well as the legislative history of section 20b shows that section 20b is permissive and that section 20b(7) provides an optional method of altering a railroad's financial structure by authorizing the carrier to accomplish the alteration by any lawful manner other than the procedures of section 20b. In short, section 20b does not create the exclusive means under which a railroad can effectuate the modification or alteration of its financial structure. It gives the carrier the option to select alternative means.

We do not necessarily agree with MoPac that if it had elected to proceed under section 20b, the Commission's jurisdiction over the proceeding would have been doubtful merely because of MoPac's sound financial condition. See Boston & M. R. Securities Modification, 275 I.C.C. 397, 275 I.C.C. 527, 275 I.C.C. 752, and 282 I.C.C. 750. Cf., Western Maryland Railway Company Securities Modification, 290 I.C.C. 445, reversed in Wood v. United States, 132 F. Supp. 586. It is not necessary, however, to decide that question here because MoPac has elected not to seek Commission approval under 20b.

We do, however, agree with MoPac that section 20b provides an optional method under which a railroad may effect a modification of its financial structure and that a carrier may elect not to invoke the provisions of 20b in a situation where it can accomplish the modification by any other lawful manner. As indicated, MoPac has elected to bypass section 20b and has chosen to effect its recapitalization by amending its Articles of Association in accordance with Missouri law. We believe this approach conforms with the provisions of section 20b(7).

Section 388.220 Revised Statutes of Missouri, 1969, provides for Amendments to Articles of Incorporation and expressly provides for the reclassification and exchange of shares of railroad stock. Section 388.220 provides that a railroad corporation may amend its articles of incorporation from time to time to exchange, classify, reclassify or cancel all or any part of its shares, to change the designation of all or any part of its shares, to change the preferences, qualifications, limitations, restrictions and special or relative rights including convertible rights in respect of all or any part of its shares and to create a new class or classes of stock and to define the preferences, qualifications, limitations, restrictions, and the special or relative rights of the shares of such new class or classes.

Article IX of MoPac's Articles of Association[5] provides that:

> "Except as otherwise expressly provided in these Articles of Association, the rights of all holders of capital stock of the Company are subject to change, alteration, abrogation or repeal in any manner now or hereafter permitted by the laws of the State of Missouri or other applicable law."

While we need not undertake to apply or interpret the State law of Missouri, we nevertheless conclude that MoPac's proposed plan of recapitalization through amendment of its Articles of Association and its charter is a proper method of effecting recapitalization within the permissive language of section 20b(7) and that therefore the plan does not require our approval under section 20b. Accordingly, the order of August 13, 1973, to the extent that it conflicts with the conclusion herein reached, is modified. We further conclude that application herein is an application under section 20a of the Act and presents only a request for Commission authority to issue securities described in the application to effect the plan. However, while we decline to expressly approve or disapprove the plan of recapitalization under the provisions of section 20b, we nonetheless have a responsibility to examine the plan to ascertain whether it is within the purposes and objectives of section 20a and otherwise meets the public interest test prescribed by section 20a.

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[5]This term means the same as Articles of Incorporation.

Another matter raised at the hearing requiring consideration is whether Mississippi needs Commission authority to control MoPac. This question arises because as a result of the plan, the veto power of Class B shareholders will be eliminated and Mississippi will acquire additional MoPac stock as well as complete and unfettered control over MoPac. We do not believe that Mississippi needs authority to control MoPac since it already lawfully controls MoPac through stock ownership. Texas & Pac. Ry. Co. - Control - Kansas, O. & G. Ry. Co., 324 I.C.C. 309, 324; Missouri Pac. R. Co. - Control - Chicago & E. I. R. Co., 327 I.C.C. 279, 323, 324; and St. Louis SW Ry. Co. - Pur. - Alton & S.R., 331 I.C.C. As indicated, Mississippi owns approximately 62 percent of the 1,865,702 shares of MoPac's Class A common stock and Class A common stock represents 98 percent of the voting stock of MoPac, the remaining 2 percent being owned by Class B common stockholders. We note that there is no restriction in any of the above cited cases against Mississippi acquiring additional stock in MoPac.

We believe that our holding in Peoria & E. Ry. Co. v. New York Central R. Co., 334 I.C.C. 131, is governing here. In Peoria, the Commission held that a carrier which already had lawful control of another carrier through stock ownership is not required to obtain Commission approval to increase the amount of such ownership, concluding that:

> "The Commission's initial finding that control is in the public interest necessarily contemplates (unless limitations are specified) that the controlling influence of the parent-to-be will encompass all of the various corporate transactions conducted by the subsidiary-to-be and that, except for transactions such as mergers, leases, operating agreements, or security transactions, which, in

any event, require separate and additional Commission approval under specific provisions of the act, the exercise of such controlling influence is approved." (Emphasis supplied).

The Commission specifically overruled the "further control" concept adherred to in prior years, stating that "there is no acquisition of control within the meaning of section 5(2) when a carrier lawfully controlling another carrier through stock ownership increases the percentage of its holdings of the controlled carrier's stock ..." 334 I.C.C., supra, at 154.

Mississippi now has control of MoPac subject to the veto power of Class B shareholders in respect to certain corporate actions. Thus, as a result of this transaction, it cannot be said that Mississippi is acquiring control under section 5. At most, the control now held by Mississippi will be perfected by the elimination of the veto power of Class B shareholders and not by the acquisition of additional stock in MoPac. We conclude, therefore, that Mississippi has lawful control of MoPac and that it needs no further authority under section 5(2)(a) to acquire additional stock in MoPac.

Section 20a(2) provides in pertinent part that it shall be unlawful for any carrier subject to part I of the Act to issue any share of capital stock unless and until and then only to the extent that, upon application by the carrier, the Commission by order authorizes such issue. Section 20a(2) further provides that the Commission shall make such order only if it finds that such issue:

> "(a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

Under the criteria of section 20a(2), it is necessary to find, among other things, that the proposed issuance of stock is compatible with the public interest. The phrase "compatible with the public interest" means not contradictory or hostile to the public interest. In Re Chicago, R.I. & P. Ry. Co., 168 F.2d. 587, Chesapeake & O. R. Co. - Control - Baltimore & O. R. Co., 317 I.C.C. 261, 285, and Ill. Gulf R. Acquisition--G. M. & O., et al., 338 I.C.C. 805, 874. In Pacific Power and Light Co. v. Federal Power Commission, 111 F.2d. 1014, 1016, it was held that the phrase "consistent with the public interest" does not connote a public benefit to be derived or suggest the idea of a promotion of public interest. Instead, the thought conveyed is merely one of compatibility or the concept of not being hostile to the public interest. In cases involving the rights of stockholders we have previously held that the rights of stockholders are a part of the public interest. Therefore, in appraising any transaction affecting the rights of stockholders, it is incumbent upon us to see that the interests of minority stockholders are protected and that the overall proposal is just and reasonable as to those stockholders. Schwabacher v. United States, 334 U.S. 182, 198, 201.

Thus, it becomes necessary to evaluate the proposed plan of recapitalization and determine whether it is within the purposes and objectives of section 20a(2) and meets the public interest test prescribed therein. We hold that the proposed plan is fair and reasonable to all stockholders and otherwise fully complies with the requirements of section 20a(2). In reaching this conclusion, we have given consideration to the negotiated agreement embracing the plan of recapitalization, the value per share of the Class A and Class B stock, the consideration to be paid for each share of existing stock, the evidence of the parties at the hearings, and their arguments and contentions on brief. In addition, we have given consideration to the fact that the elimination of the veto power held by Class B stock will simplify MoPac's capital structure and that the conversion feature of the new preferred may result in an all-common stock structure. Moreover, the proposed plan will provide an effective means for the payment of higher dividends; it should render equity financing more feasible, more equitably distribute the voting power among the stockholders, eliminate the confusion between the position of Class A and Class B shareholders and thus enable MoPac to more effectively plan a more efficient and economical transportation system, including mergers with other railroads.

We note that the plan was embodied in an agreement between MoPac, Mississippi, and Alleghany after extended arms-length negotiations, and that the negotiations leading to the agreement

were participated in not only by lawyers representing the parties and by executives and financial officers of the involved corporations, but also by independent financial analysts and investment advisers specializing in corporate and transportation finance. Because of the substantial interest of Alleghany in the matter, it represented its own interest in the negotiations, and by requiring that minority stockholders be accorded equal treatment, it thus represented with equal vigor the interests of Class B stock as a whole. In the suit for higher dividends by Class B shareholders, the court concluded that the settlement agreement was a reasonable compromise to a difficult problem, observing that stockholders' litigation is notably difficult and unpredictable, and although the court was careful not to forecast the outcome of the stockholders' litigation, it nevertheless stated that the outcome is doubtful and the likelihood of recovery by the Class B stockholders is questionable. As an alternative to the continuance of the litigation, the court approved the settlement, stating that it falls within the range of reasonableness. See Levin et al. v. Mississippi River Corporation et al., supra. We believe that the results reached by the negotiators and the court under a high standard of fiduciary responsibility were clearly designed to serve the best interest of both classes of stockholders.

Following the court's decision approving the settlement agreement, the plan was approved by an overwhelming majority of MoPac's stockholders, including a majority of the minority stock

of each class. Notwithstanding this, we deem it necessary to determine whether the stockholders will receive fair value for what they will surrender and whether the plan is compatible with the public interest.

As indicated, each share of MoPac's present Class A stock will be entitled to one share of new cumulative convertible preferred stock without par value, and each share of MoPac's Class B stock will be converted into 16 shares of new common stock, plus a right to receive $850 in cash from the carrier for each share of Class B stock. Since the new common stock is valued at $100 a share, the exchange rate of 16 shares of new common for 1 share of Class B stock plus $850 in cash results in a price of about $2,450 for each share of Class B stock. The dispute among Class B shareholders is whether they are receiving the economic equivalent of what they are giving up, and this, in turn, depends upon the present value of Class B stock. MoPac used several methods of evaluating both classes of stock and concluded that the value of the offer of $2,450 for each share of Class B stock reflects the approximate economic value of each share of Class B stock. As indicated, MoPac through an Alleghany witness, used the capitalized earnings method to determine separately the present and prospective worth of MoPac and allocated the total worth of the corporation between both classes of stock. Using MoPac's earning of $25 million in 1971, and $27 million in 1972, to which was applied a price earnings ratio of 9:1, the present value of the equity ranged between $240 million and $250 million. In allocating the total value

between Class A and Class B stock, the market value price of Class A stock before the settlement agreement was taken into account.[6] Using a price of $70 to $75 per share for Class A stock, which was the market range before settlement, the Class A stock has an aggregate value of $130 million to $140 million, leaving an aggregate value of between $100 million and $120 million for Class B stock. On the present worth basis, the value per share of Class B stock ranges between $2,512 and $2,457 per share. The prospective value of MoPac in 1977 discounted to current realization resulted in a value of $90 million to $100 million for Class B stock and a slightly less value per share. Thus, the offer of $2,450 a share for Class B stock is approximately the same as the value of Class B stock on the basis of MoPac's present worth and somewhat higher than the value of MoPac in 1977 discounted to current worth. An independent financial adviser, who also used the capitalized earning method, concluded that the value of Class B stock based on MoPac's 1971 and 1972 earnings ranges from $2,139 to $2,592 a share, or an average of $2,365 a share. We believe that the allocation of value to Class A stock on the basis of market value is a realistic approach and that after deducting the market value of Class A stock, the remainder of the value may reasonably be allocated to Class B stock. The same method cannot be used for both classes of stock

[6]Class A stock is traded on the New York stock exchange, is traded on a broad market, and has an active market value; Class B stock is traded on the over-the-counter market and the traders are few. The market range for Class B stock has been between $1,100 and $2,500 a share.

because Class B stock is lightly traded over the counter, its traders are few, and the price is too fluctuating. However, the Class A stock has an active market, with almost 700,000 shares held by the public, and its fair value can be realistically determined by the realities of the market place. On the other hand, Class B stock has no active market and thus cannot reasonably be valued by market prices. We note, however, that with a price ranging between $1,100 and $2,500 a share, the average price per share of Class B stock would be considerably less than the value determined on the capitalized earnings method.

We have frequently held that a railroad's earning power is the primary determinant of value and that future earnings that have a reasonable prospect of realization have an important bearing on value. See Seaboard Air Line R. Co. - Merger - Atlantic Coast Line, 320 I.C.C. 122, 193; Schwabacher v. United States, supra. Current and historic earnings may properly be considered, and with varying degrees of emphasis, future earnings may be a reliable criterion of current worth. Consolidated Rock Co. v. DuBois, 312 U.S. 510, 526. Thus, the capitalization of earnings method used here to determine present and prospective worth is a reasonably conventional and generally accepted method for determining the value of stock. We accordingly conclude that the offer of $2,450 per share for Class B stock approximates its value per share under the capitalized earnings method employed in this proceeding and represents fair value. Although the settlement agreement was negotiated at arms length, and the parties were

presumably capable of determining their own best interest, it nevertheless appears that the settlement agreement though fair to all parties gave the benefit of doubt to the Class B stockholders. It is not our function, however, to revise the agreement unless there is some aspect of it that is contrary to the public interest. In our opinion, the proposed plan is not contrary to the public interest. In fact, considering the benefits to each class of stock and the advantages to the carrier, it is our conclusion that the plan of recapitalization will be in the best interest of the stockholders and the carrier and will be compatible with the public interest. Our conclusion is supported by the evidence of record, including the statistical data presented by Witness Benham whose share capitalization method based upon available earnings and dividend payments over a 17-year period form the basis for her conclusion that the exchange rate provided for in the settlement agreement for both classes of stock is reasonable. We believe that the detailed statistical data presented by Witness Benham is entitled to considerable weight.

Based on value, it is our opinion that the exchange ratio for the Class A stock is also fair. In addition, the position of the new preferred stockholders, formerly Class A stockholders, will be strengthened because they will be receiving convertible preferred stock and a right to cumulative dividends--features which the present Class A stock does not possess--and the new

preferred should therefore command a better market than the Class A stock. As indicated, we are convinced that based upon conventional methods of valuation, Class B stockholders will be receiving in the form of stock and cash (16 to 1 plus $850) the approximate quid pro quo of the Class B stock they will be surrendering. Additionally, Class B stock will receive additional benefits in that they will have an opportunity for representation on the Board of Directors, the potential for higher dividends and a better market for the new common stock because of a greatly enlarged number of shares.

Also, there are numerous benefits to MoPac, the foremost of which is the elimination of the class vote and the dividend conflict between Class A and Class B shareholders. After the recapitalization, Mississippi will own a majority of the new common as well as the preferred, and the veto power will be eliminated. Thus, MoPac will have more stability in management and greater flexibility in policy decisions particularly with respect to mergers and consolidations. Even though MoPac is borrowing $15 million and possibly more to make the cash payments required by the plan, it is our view that this will not impose a financial strain on the carrier. There is no doubt that the plan and the issuance of the necessary securities to effect the plan are for a lawful objective within the carrier's corporate purposes, appropriate or necessary for its proper performance of service to the public as a common carrier, and will not impair its ability to

perform that service, and are therefore in the public interest. Finally, we believe that the elimination of Alleghany's ownership in MoPac's stock is a matter that tends to promote the public interest. See Alleghany Corporation--Control and Purchase--Jones Motor Co., Inc. - and Control Erie Trucking Company, 109 M.C.C. 333.

In reaching our conclusions, we have examined the evidence, statements, arguments and contentions of the protestants and find that they are insufficient to overcome our findings that the plan is fair to all stockholders as well as to the railroad and that it is therefore in the public interest. Protestants' claim that the value per share of their Class B stock is almost $9,000 a share is based upon a misconception that the value of stock is to be measured solely by book value or equity value. The terms "book value" and "equity value" mean the same thing, and neither the courts nor this Commission have accepted book value alone as the norm for determining the fair value of stock. See Seaboard Air Line R. Co. - Merger - Atlantic Coast Line, supra, at 193; Schwabacher v. United States, supra. As indicated, the predominant factor in determining the fair value of railroad stock is the earnings of the railroad, Louisville & N. R. Co. - Merger, 295 I.C.C. 457, and the applicant has properly used the capitalized earnings method to compute the value of the stock here. See Boston & M. R. Securities Modification, 275 I.C.C. 397, 431. Equity or book value is of significance only in the event of MoPac's liquidation or nationalization. Moreover, land values are of little or no significance in determining the value of stock.

In view of MoPac's healthy financial condition, the possibility of either liquidation or nationalization appears remote. But, even assuming that MoPac may be liquidated at some future date, the chances of stockholders recovering the book value of their stock are minimal. From past experience, we note that stockholders very rarely recover book value on liquidation. Upon liquidation, liquidation value then becomes the norm. At any rate, the rights of stockholders and the value of their respective stock is to be measured by earnings power rather than upon book value which may never be realized.

With respect to equity value, protestants assert, and the facts are not disputed, that the portion of the plan calling for the conversion of new convertible stock into new common, will result in a change in the equity of Class B stockholders, reducing it from 60 to 65 percent to about 25 percent. Because of this, they argue that the plan has the effect of depriving them of their property without just compensation and is therefore violative of the due process clause of the United States Constitution. The short answer to that argument is that Class B shareholders are receiving value for value based upon recognized methods of valuation and that book or equity value has little or no significance in the evaluation of stock. What is being changed is a potential value on liquidation which as indicated above, can rarely, if ever, be realized. In short, they are being deprived of a bookkeeping entry rather than a real, tangible asset. Moreover, every recapitalization contemplates a change in the equity

position of stockholders, and the law recognizes that it may be accomplished with the consent of the majority of the shareholders, and in some situations, without their consent. In Missouri Pac. R. Co. Reorganization, supra, at 493, the Commission foresaw the possibility of MoPac's recapitalization and the alteration of the rights of shareholders, and imposed a condition that such alteration should not occur without consent of at least the majority of the shares of each class of stock. MoPac has more than complied with this requirement. If the argument of protestants were to be accepted, corporate recapitalization could never be accomplished without the unanimous consent of all stockholders. So long as provision is made in the recapitalization plan for giving stockholders the approximate equivalent of what they are surrendering, as the plan does in the instant proceeding, the claim of an unlawful taking of property has no merit. Under the circumstances here, it may not reasonably be concluded that Class B stockholders are being deprived of their property or property rights in violation of any provision of law or the Constitution.

Contrary to protestants' contentions, the Commission's decision in Missouri Pac. R. Co. Reorganization, supra, approving MoPac's reorganization, does not constitute a bar to MoPac's present plan or recapitalization. In this regard, protestants assert that the reorganization plan is the "law of the land," is an immutable contract between the carrier and its stockholders, and that therefore a change in the reorganization as

contemplated by the plan of recapitalization is illegal. Further, they argue that no change in the relationship between classes of stockholders can be accomplished except by reopening the reorganization proceeding. None of these contentions has merit. The reorganization proceeding was terminated when it was judicially approved, the time for reconsideration has long since passed and neither the Commission nor the courts reserved jurisdiction except as to administrative details to implement the plan. Nor is there any merit in the argument that the plan of reorganization was erroneous and that the reorganization proceeding should be reopened. The matter has been fully reviewed and approved by the Federal courts and is res adjudicata. Moreover, there is nothing in the Interstate Commerce Act or elsewhere in the law, or in the Commission's reorganization reports, which would convert the reorganization plan into "the law of the land" or into an "immutable contract" for all time. In fact, the Commmssion's report in the reorganization plan, as indicated above, recognized the possibility of a change in the relationship between the two classes of stock. Moreover, the Commission's jurisdiction under 20a is plenary and exclusive and independent of any other Federal authority. Schwabacher v. United States, supra, at 197. Since the matter involved in this proceeding comes within the purview of section 20a, our jurisdiction in the proceeding is supreme and need not be coordinated with a reorganization proceeding in which the record has been closed for almost 20 years.

Also, there is a sharp difference of opinion between some Class B stockholders and MoPac as to whether the present Class A stock is cumulative and whether or not a current dividend on the Class A stock may be paid from available net income from prior years. While this may be an issue in a suit for dividends, it is not of importance in this proceeding. It is sufficient to observe that a provision in the General Income Mortgage states that subject to the provisions of section 6.16, dividends may be declared and/or paid on stock of any class out of available net income for any calendar year, prior or subsequent to the close of such calendar year; that this provision applies to "stock of any class," both Class A and Class B; and that the mortgage has had Commission and judicial sanction as part of the prior reorganization proceeding.

We see no merit to protestants' argument that the plan has a "congenital defect," in that a suit for dividends was illegally converted into a suit for recapitalization, or that the plan was forced upon the Class B stockholders by court fiat. The court merely held that the plan was within the range of reasonableness, and that if the plan of recapitalization were effectuated, it would be a practical and effective solution to an age-old problem. What protestants seem to overlook is the fact that the plan was the result of arms-length bargaining by the majority shareholders of each class of stock, that it was approved by an overwhelming majority of each class of stock, including the minority holders of each class, and that the issuance of the new stock to effectuate

the plan is subject to this Commission's jurisdiction and approval. Also, it appears that protestants have disregarded the fact that MoPac could have proposed the plan and put it into effect with the necessary approval of the stockholders, independent of and without prior court sanction. Under these circumstances, we fail to see that the court forced the plan upon the stockholders or that the plan is the result of "court fiat." Moreover, there is no merit in protestants' contention that the plan must originate with stockholders.

We find no merit in the assertion that Alleghany, in entering into the settlement agreement, somehow sold out other Class B stockholders. Alleghany as the majority owner of the Class B stock has spent considerable sums of money over the years to protect its interest. It is the party to the agreement that has the most to gain and the most to lose. Under the circumstances, there is little or no likelihood that Alleghany would agree to surrendering its stock for less than fair value. Besides all the evidence of record contraindicates that Alleghany agreed to accept less than fair value.

We have examined the alternate proposals presented by Class B stockholders--one a stock split for Class B stock and the other a stock split plus the purchase of Alleghany's Class B stock by MoPac--and find that they are neither justified nor practicable. Both proposals are inconsistent with the settlement agreement;

they would contravene the will of the majority of each class of stock and would fail to solve the existing conflict between equity interests because the veto power would be retained under either proposal. Moreover, the alternate proposals are completely at odds with the policy-decision that MoPac has made with respect to the matter. In short, it would simply not be in the public interest to attempt to override the overwhelming majority vote of each class of stock, the policy-decision of MoPac, and the settlement agreement, in order to satisfy the wishes of a few dissident stockholders.

Protestants have made numerous allegations of fraud, conspiracy and other acts of misconduct on the part of MoPac, Mississippi, and their respective officers and directors, and some have ascribed impropriety to the court which approved the settlement agreement. However, there is not one shred of evidence in the record to support any of these charges, and therefore no further investigation of any of protestants' charges is warranted on the basis of this record. We disagree with protestants' allegation that MoPac's proxy statement is misleading, or that as described by one protestant, "a masterpiece of deception." We have examined the proxy statement in detail and found that it contains a full and fair disclosure of all relevant facts necessary for a reasonably prudent person to make an independent judgment. Also, the proxy form itself is clear, unambiguous and self-explanatory. We find no merit in any of the protestants' allegations relating to misconduct on the part of MoPac, Mississippi, or their management.

The arguments and contentions of Gruss have no merit. Since the proposed recapitalization relates only to a change in the relationship of MoPac's two classes of stock, it will not adversely affect the interest of Gruss or any other creditor. All of the bonds and debenture instruments contain protective provisions assuring their priority over dividends, and these provisions will continue to apply after the recapitalization is accomplished. In fact, creditors are fully protected by existing provisions in their indentures and there is no prohibition in any of them against alteration of MoPac's stock structure as proposed. In view of MoPac's healthy financial condition, we foresee no problem from MoPac's borrowing $15 million to pay the $850 a share for the Class B stock. The fact that MoPac has to finance the plan to meet its cash obligations is not indicative of a lack of available net income, since as calculated under the indentures the term "available net income" has no relationship to cash available. Every year since reorganization, MoPac has earned and paid all contingent charges, and as of January 1, 1973, there remains available net income of over $73 million from prior years even after the payment of the lowest debt priority (debenture interest) and dividends. We believe that this accumulated available net income clearly demonstrates MoPac's ability to carry out the plan without in any way affecting the creditors. Gruss' complaint concerning the $850 payment per share is ill founded. Other than meeting its

sinking fund requirements and paying contingent interest charges, MoPac's expenditures are dictated by the judgment and discretion of its directors and officers; in the past it has met its obligations to creditors and there is nothing in the recapitalization plan that would impair its ability to continue to do so. Therefore, Gruss has little or no standing to question the $850 payment per share but even if it did, the payment is fully justified in the public interest. On this record, there is no basis for granting any of the conditions requested by Gruss. Lastly, it is doubtful whether Gruss has any standing to seek any type of redress in this proceeding, since under the terms of the indentures corporate trustees have the duty to protect the bondholder, and the bondholder itself is forbidden to seek independent legal remedy unless it has given written notice to the trustees. Gruss does not allege and there is no evidence of record that Gruss has delivered such written notice.

Accordingly, we find that the proposals for the issuance of securities are (a) for some lawful object within the corporate purposes of MoPac and are compatible with the public interest, which is necessary or appropriate for, or consistent with, the proper performance by MoPac of service to the public as a common carrier and will not impair its ability to perform that service; and (b) reasonably necessary and appropriate for such purpose.

We further find that the proposed plan of recapitalization is fair and reasonable to all parties in interest, that it is in the public interest, and that the proposed issuance of securities meets the statutory requirements of section 20a and conforms generally with the purposes and objectives of the national transportation policy declared by Congress.

We further find that the plan of recapitalization herein discussed and the issuance of securities to effect the plan, will have no effect upon the quality of human environment, and that the decision herein is not a major Federal action significantly affecting the quality of human environment within the meaning of the National Environmental Policy Act of 1969.

Arguments and contentions not specifically discussed herein have been considered and found to be without merit.

STATUTORY FINDINGS

We find that (1) the issuance by the Missouri Pacific Railroad Company of not exceeding 1,865,702 shares of no-par $5 cumulative preferred stock, each share having one vote, initially a stated value of $100 per share, and being convertible one year after the Commission's final order of approval into common stock share-for-share and being callable at $100 per share on and after January 1, 1976; (2) the issuance by the Missouri Pacific Railroad Company of not exceeding 635,696 shares of no-par common stock, each having one vote per share and a stated value of $6.25 per share; and (3) the reservation and subsequent issuance of not exceeding 1,865,702 shares of

said common stock upon conversion of the preferred stock, to effect a plan of recapitalization herein discussed, (a) are for a lawful object within the corporate purposes of the Missouri Pacific Railroad Company and compatible with the public interest, which are necessary or appropriate for or consistent with the proper performance by the Missouri Pacific Railroad Company of service to the public as a common carrier, and which will not impair the ability of the said Missouri Pacific Railroad Company to perform that service, and (b) are reasonably necessary and appropriate for such purposes.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

ORDER

At a session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 6th day of December, 1973.

Finance Docket No. 27346

MISSOURI PACIFIC RAILROAD CO., SECURITIES

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held and briefs filed, and the Division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is referred to and made a part hereof:

It appearing, That because of limitations upon the time available for decision, the Commission, Division 3, on September 7, 1973, ordered the omission of an Administrative Law Judge's initial decision and certification of the record to the Commission, Division 3, for decision;

It is ordered, That the Missouri Pacific Railroad Company be, and it is hereby authorized (1) to issue not exceeding 1,865,702 shares of no-par $5 cumulative preferred stock, each share having one vote and initially a stated value of $100 per share, and being convertible one year after the Commission's final order of approval into common stock, share for share and being callable at $100 per share on and after January 1, 1976; (2) to issue not exceeding 635,696 shares of no-par common stock, each having one vote per share and a stated value of $6.25 per share, and (3) to reserve and subsequently issue an additional 1,865,702 shares of said common stock upon conversion of the preferred stock, upon the terms and for the purposes stated in the said report;

It is further ordered, That the application filed by the Missouri Pacific Railroad Company on April 4, 1973, as supplemented, be, and it is hereby, granted;

It is further ordered, That except as herein authorized the aforesaid stock shall not be sold, pledged, or repledged or otherwise disposed of by the Missouri Pacific Railroad Company unless or until so ordered or approved by this Commission;

It is further ordered, That the Missouri Pacific Railroad Company shall report concerning the matters herein involved in conformity with the order of the Commission, Division 3, dated May 20, 1964, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 1115.6);

It is further ordered, That nothing herein shall be construed to imply any guarantee or obligation as to said stock, or dividends or interest thereon, on the part of the United States;

It is further ordered, That the petition of Archibald Aron to reopen the proceeding, be, and it is hereby, denied;

It is further ordered, That the order of August 13, 1973, to the extent that it conflicts with the findings and conclusions reached in the said report be, and it is hereby, modified;

It is further ordered, That this order shall be effective on the date it is served, and that unless the authority granted herein is exercised within 180 days from the date hereof, it shall be of no further force and effect.

By the Commission, Division 3.

ROBERT L. OSWALD

Secretary

(SEAL)

F.D. No.27346
APPENDIX I

MISSOURI PACIFIC RAILROAD COMPANY
GENERAL BALANCE SHEET

ASSETS

	December 31, 1972		February 28, 1973	
Current Assets				
Cash		$ 9,656,784		$ 11,511,503
Temporary Cash Investments		18,500,000		27,800,000
Special Deposits		15,251,475		1,043,614
Accounts Receivable		37,443,585		37,446,537
Material and Supplies		13,898,760		13,643,414
Other Current Assets		421,100		690,295
Total Current Assets		95,171,704		92,135,363
Special Funds				
Capital and Other Reserve Funds		4,348,126		268,262
Sinking Funds, Insurance and Other Funds		5,777,337		5,839,617
Total Special Funds		10,125,463		6,107,879
Investments				
Investments in Affiliated Companies		92,302,533		92,218,900
Other Investments		9,208,260		8,125,518
Total Investments		101,510,793		100,344,418
Properties				
Road and Equipment Property	$1,136,658,452		$1,141,829,475	
Improvements on Leased Property	21,336	1,136,679,788	21,336	1,141,850,811
Less:				
Accrued Depreciation - Road and Equipments	268,471,250		270,577,703	
Amortization of Defense Projects Road and Equipment	7,718,042	276,189,292	7,513,858	278,091,561
		860,490,496		863,759,250
Miscellaneous Physical Property	18,006,819		17,996,935	
Less:				
Accrued Depreciation - Miscl. Physical Property	5,812,970	12,193,849	5,823,671	12,173,264
Total Properties		872,684,345		875,932,514
Other Assets and Deferred Charges				
Other Assets and Deferred Charges		4,885,495		6,098,442
Unamortized Discount on Long Term Debt		835,204		817,076
Total Other Assets and Deferred Charges		5,720,699		6,915,518
Grand Total		$1,085,213,004		$1,081,435,692

MISSOURI PACIFIC RAILROAD COMPANY
GENERAL BALANCE SHEET

F. D. No. 27346
APPENDIX II

LIABILITIES

	December 31, 1972	February 28, 1973
Current Liabilities		
Accounts and Wages Payable	$ 55,154,945	$ 56,378,478
Interest Matured Unpaid	6,217,571	509,526
Dividends Matured Unpaid	1,069,870	37,437
Unmatured Interest Accrued	11,792,090	15,937,285
Taxes Accrued	11,305,329	12,126,149
Other Current Liabilities	12,347,010	7,302,221
Total Current Liabilities	97,886,815	92,291,096
Long Term Debt Due Within One Year	13,471,608	13,241,608
Long Term Debt		
Funded Debt Unmatured	471,711,200	471,711,200
Equipment Obligations	106,946,782	105,661,811
	578,657,982	577,373,011
Less Portion Held by or for Company	14,965,300	14,965,300
Total Long Term Debt	563,692,682	562,407,711
Reserves		
Equalization Reserves	-	38,729
Injury and Damage Claims	4,599,558	5,321,121
Other Reserves	7,095,163	7,310,669
Total Reserves	11,694,721	12,670,519
Other Liabilities and Deferred Credits	7,115,075	7,037,590
Shareholders Equity		
Capital Stock		
Class "A"	186,435,200	186,570,200
Class "B"	3,973,100	3,973,100
Total Capital Stock	190,408,300	190,543,300
Capital Surplus	1,504,581	1,450,538
Retained Income		
Retained Income - Appropriated	91,812,538	93,155,804
Retained Income - Unappropriated	107,626,684	108,637,526
Total Retained Income	199,439,222	201,793,330
Total Shareholders Equity	391,352,103	393,787,168
Grand Total	$1,085,213,004	$1,081,435,692

F.D. No. 27346
APPENDIX III

MISSOURI PACIFIC RAILROAD COMPANY

INCOME ACCOUNT

	Year Ended December 31, 1972	January 1 to February 28, 1973
Operating Income:		
Railway Operating Revenues	$451,081,347	$77,480,488
Railway Operating Expenses	343,796,894	58,932,123
Net Revenue from Railway Operations	107,284,453	18,548,365
Railway Tax Accruals	29,154,415	5,255,139
Equipment Rents - Net	34,830,346	6,769,000
Joint Facility Rents - Rents	4,618,238	501,567
Net Railway Operating Income	38,681,454	6,022,659
Other Income:		
Income from Lease of Road & Equipment	506,836	86,003
Miscellaneous Rent Income	1,700,210	297,076
Income from Non-Operating Property	140,489	24,857
Dividend Income	4,230,147	206,848
Interest Income	1,825,742	346,254
Income from Sinking & Other Reserve Funds	127,605	5,761
Miscellaneous Income	3,027,702	447,436
Total Other Income	11,558,731	1,414,235
Total Income	50,240,185	7,436,894
Miscellaneous Deductions:		
Miscellaneous Rents	122,385	20,074
Miscellaneous Tax Accruals	235,599	48,357
Miscellaneous Income Charges	4,406,619	165,679
Total Miscellaneous Deductions	4,764,603	234,110
Income Available for Fixed Charges	45,475,582	7,202,784
Fixed Charges:		
Rent for Leased Roads & Equipment	58,932	16,530
Interest on Funded Debt	18,293,728	3,114,240
Interest on Unfunded Debt	8,938	
Amortization of Discount on Funded Debt	137,045	19,485
Total Fixed Charges	18,498,643	3,150,255
Income after Fixed Charges	26,976,939	4,052,529
Other Deductions:		
Contingent Interest on Funded Debt	10,190,527	1,698,421
Net Income	$ 16,786,412	$ 2,354,108

MISSOURI PACIFIC RAILROAD COMPANY

COMPUTATION AND APPLICATION OF AVAILABLE NET INCOME

Income of Missouri Pacific Railroad Company and its Wholly-Owned Railway Companies
(as required by the Company's Mortgages and Indenture)
(000)

	1972	1971	1970	1969	1968	1967	1966	1965	1964	1963	1962	1961	1960	1959	1958	1957*	1956
Inc. Before Fxd. Chgs. & After Fed. Inc. Taxes	$45,476	$37,072	$45,217	$41,429	$41,761	$57,723	$44,278	$45,445	$45,148	$44,360	$42,742	$35,921	$37,976	$41,118	$41,413	$44,039	$45,784
Inc. of Wholly-Owned Railway Companies	(67)	115	115	58	265	242	240	549	430	469	592	499	480	549	321	345	479
Road Property Retired and Charged to Oper. Expe.	2,561	1,895	1,306	1,519	2,250	68	653	410	461	284	478	470	95	250	81	539	329
Other Income Adjustments - Net							1,613	243	417		1,608			42	1,175	28	-
	47,970	39,082	46,638	43,006	44,276	58,033	46,784	46,647	46,456	45,113	45,420	36,890	38,551	41,959	42,990	44,951	46,592
Less - Divs. of 100% Ry. Comps. Incld. in MOP Inc.			200	250	450	200	200	768	730	561	465	425	415	601	726	1,150	-
Total Inc. Available for Fixed Charges	47,970	39,082	46,438	42,756	43,826	57,833	46,584	45,879	45,726	44,552	44,955	36,465	38,136	41,358	42,264	43,801	46,592
Fixed Charges	18,499	16,959	16,588	15,446	14,718	14,714	15,039	15,277	15,194	15,004	14,984	15,187	15,055	14,484	14,511	14,376	14,855
Available Net Income	29,471	22,123	29,850	27,310	29,108	43,119	31,545	30,602	30,532	29,548	29,971	21,278	23,081	26,874	27,753	29,425	31,737
Capital Expenditures Fund	7,243	5,946	4,548	4,477	3,859	3,631	4,258	5,011	4,024	3,660	3,658	3,177	3,937	3,828	7,169	7,669	7,544
Remaining Income	22,228	16,177	25,302	22,833	25,249	39,488	27,287	25,591	26,508	25,888	26,313	18,101	19,144	23,046	20,584	21,756	24,193
First Mortgage Sinking Fund	771	771	771	771	771	771	771	772	771	771	771	772	2,315	2,315	2,315	2,315	2,315
Remaining Income	21,457	15,406	24,531	22,062	24,478	38,717	26,516	24,819	25,737	25,117	25,542	17,329	16,829	20,731	18,269	19,441	21,878
Interest on Gen. Mtge. Bonds, Series A	2,692	2,712	2,794	2,807	2,709	2,832	2,833	2,833	2,812	2,854	2,844	2,980	3,088	3,086	3,119	3,161	3,213
Remaining Income	18,765	12,694	21,737	19,255	21,769	35,885	23,683	21,986	22,925	22,263	22,698	14,349	13,741	17,645	15,150	16,280	18,665
Sinking Fund on Gen. Mtge. Bonds, Series A	350	350	350	350	350	350	350	349	350	350	350	350	524	524	525	525	524
Remaining Income	18,415	12,344	21,387	18,905	21,419	35,535	23,333	21,637	22,575	21,913	22,348	13,999	13,217	17,121	14,625	15,755	18,141
Interest on Gen. Mtge. Bonds, Series B	2,497	2,538	2,645	2,674	2,559	2,703	2,702	2,703	2,682	2,723	2,708	2,844	2,969	2,963	2,995	3,028	3,098
Remaining Income	15,918	9,806	18,742	16,231	18,860	32,832	20,631	18,934	19,893	19,190	19,640	11,155	10,248	14,158	11,630	12,727	15,043
Sinking Fund on Gen. Mtge. Bonds, Series B	338	338	338	338	338	338	338	338	338	338	338	338	507	507	507	507	507
Remaining Income	15,580	9,468	18,404	15,893	18,522	32,494	20,293	18,596	19,555	18,852	19,302	10,817	9,741	13,651	11,123	12,220	14,536
Interest on Income Debentures	5,001	5,001	5,001	5,001	4,916	5,001	5,001	5,001	5,001	5,001	4,972	5,027	5,027	5,027	5,027	5,027	5,026
Balance	$10,579	$ 4,467	$13,403	$10,892	$13,606	$27,493	$15,292	$13,595	$14,554	$13,851	$14,330	$ 5,790	$ 4,714	$ 8,624	$ 6,096	$ 7,193	$ 9,510
Deduction for Income Taxes on GAAP basis	5,850	3,462	5,812	2,540	3,007	2,000	2,694	6,214	6,956	7,131							
After GAAP Adjustment	$ 4,729	$ 1,005	$ 7,591	$ 8,352	$10,599	$25,493	$12,598	$ 7,381	$ 7,598	$ 6,720							

*As restated in 1958 annual report.

Source: Company Annual Reports

MISSOURI PACIFIC

Available Earnings vs. Dividends Paid

-000-

Year	Balance Available for Div.	Dividend Pd. on A	Balance Available for B	Dividend Pd. on B
1972	$ 10,579	$ 9,320	$ 1,259	$ 199
1971	4,467	9,319	(4,852)	199
1970	13,403	9,317	4,086	199
1969	10,892	9,314	1,578	199
1968	13,606	9,302	4,304	199
1967	27,493	9,283	18,210	199
1966	15,292	9,243	6,049	199
1965	13,595	9,283	4,312	199
1964	14,554	9,264	5,290	199
1963	13,851	6,281	7,570	-
1962	14,330	4,418	9,912	-
1961	5,790	4,492	1,298	-
1960	4,714	4,492	222	-
1959	8,624	4,492	4,132	-
1958	6,096	4,492	1,604	-
1957	7,193	7,675	(482)	-
1956	9,510	3,743	5,767	-
Total 1956-1972:	$193,989	$123,730	$70,259	$1,791

Source: Company Annual Reports

MISSOURI PACIFIC

Creation of Share Capitalization

Balance for Dividends in accordance with Available Net Income formula 1956-1972 incl.	$193,989,000
Dividends Paid on A 1956-1972 incl.	$123,730,000
% Total Dividends Paid to Total Available Net Income	63.78%
MoPac A Shares Outstanding 12/31/72	1,864,352
Possible Share Capitalization providing for A to have 63.78% of Total	2,923,098

Allocation of Share Capitalization

	Shares	Assumed Value
Assumed Capitalization*	3,000,000	$300,000,000
Allocated to A**	2,000,000	200,000,000
Balance remaining for B	1,000,000	100,000,000
One-time payment to B (39,731 x $850)		33,771,350
Balance		66,228,650
Dividends received by B shareholders (1964-72)		1,791,000
Balance		$ 64,437,650

The balance of $64,437,650 divided by 39,731 shares of B equals..... 16.2 shares

*Assumes $100 value.
**Shares to be issued on a one for one basis.

MISSOURI PACIFIC

"A" Dividend Requirement vs. Actual Dividends Paid On A

Year	Number of A Shares Outstanding	$5 Dividend Requirement on A Shs. Outstg. -000-	Dividend Actually Pd. on A -000-
1972	1,864,352	$ 9,322	$ 9,320
1971	1,864,052	9,320	9,319
1970	1,863,552	9,318	9,317
1969	1,863,352	9,317	9,314
1968	1,861,577	9,308	9,302
1967	1,858,777	9,284	9,283
1966	1,852,977	9,265	9,243
1965	1,844,625	9,223	9,283
1964	1,856,201	9,281	9,264
1963	1,849,576	9,248	6,281
1962	1,843,326	9,217	4,418
1961	1,871,781	9,359	4,492
1960	1,871,957	9,360	4,492
1959	1,871,957	9,360	4,492
1958	1,871,957	9,360	4,492
1957	1,871,957	9,360	7,675
1956	1,871,957	9,360	3,743
Total 1956-1972 incl.		$158,262	$123,730

Recapitulation

Total Available Earnings 1956-1972 (Appendix II)	$193,989,000
Total Payments if $5 paid each year 1956-1972	158,262,000
Balance Remaining for B:	$ 35,727,000

Source: Company Annual Reports

F.D. No. 27346
APPENDIX IX

MISSOURI PACIFIC

Pro-Forma Coverage New Preferred Stock Dividend

Year	Inc. Avail. For Fixed Charges After F.I.T.* -000-	Fixed Charges Minority Int. and Pfd. Div. -000-	Coverage Through Pfd. Div.
1972	$66,376	$48,592	1.37x
1971	62,998	46,556	1.35
1970	58,329	45,801	1.27
1969	55,862	43,897	1.27
1968	52,947	43,082	1.23
3 yr. av.	62,567	46,983	1.33
5 yr. av.	59,302	45,585	1.30

* Consolidated earnings as reported on ICC basis.

Source: Company Annual Reports

New Preferred Shares	1,864,352
New Common Shares	635,696
Total Shares	2,500,048

MISSOURI PACIFIC

Pro-Forma Earnings On New Common Shares

Before Dilution

	ICC Basis		GAAP Basis	
Year	Balance For Common After Pfd. Dividend -000-	Earnings Per Share (ICC)	Balance For Common After Pfd. Dividend -000-	Earnings Per Share(GAAP)
1972	$17,784	$27.98	$ 7,308	$11.50
1971	16,442	25.86	8,788	13.82
1970	12,528	19.71	2,440	3.84
1969	11,965	18.82	4,818	7.58
1968	9,865	15.52	2,360	3.71
3 yr.av.	15,585	24.52	6,179	9.72
5 yr.av.	13,717	21.58	5,143	8.09

After Dilution

	Balance For Common	Per Share	Balance For Common	Per Share
1972	$27,106	$10.84	$16,630	$ 6.65
1971	25,764	10.31	18,110	7.24
1970	21,850	8.74	11,762	4.70
1969	21,287	8.51	14,140	5.66
1968	19,187	7.67	11,682	4.67
3 yr.av.	24,907	9.96	15,501	6.20
5 yr.av.	23,039	9.22	14,465	5.79

Note: Earnings are on a consolidated basis as reported before extraordinary charges.

Source: Proxy Statement dated May 8, 1973 for 1972-1970 earnings and Company annual reports for 1969 and 1968 earnings.

ENTERED
IN OFFICE DOCKET

Rec'd by mail
1/14/74
(Postmarked
1/11/74)

1550 Ocean Avenue
Mantoloking
New Jersey
08738

January 10, 1974

Office of the Secretary
Interstate Commerce Commission
Washington, D. C.

Sirs:

Re: Finance Docket No. 27346
Missouri Pacific Railroad Company - MOPAC
Petition for Reconsideration of Report and
Order of Division 3, Decided December 6, 1973;
Served and Effective December 14, 1973

In accordance with the General Rules of Practice of the Interstate Commerce Commission, I hereby request reconsideration of the Report and Order of the Interstate Commerce Commission, Division 3, decided December 6, 1973, served and effective December 14, 1973, for the following reasons:

Section 1. There are serious questions of due process of law in that I and others similarly situated were not properly represented in the Federal District Court action (67 CIV 5095) Southern District of New York, out of which this recapitalization was born.

a. Subject ICC Report properly observes on page 7, "The court noted that several of the complaints contained no request for specific relief, stating that the thrust of all of the complaints dealt with MOPAC'S dividend policy with respect to Class B stock."

Judge Frederick van Pelt Bryan issued his class action order on October 9,1968 with respect to dividends with no intervention after December 20, 1968. Judge Edward Weinfeld issued his order with respect to recapitalization binding all Class B stockholders four years later on December 20, 1972. Judge Weinfeld dealt at length in his decision with the difficulty of proving dividend deficiency. (MOPAC Proxy Statement dated May 8, 1973, pages D-6 through D-8) and allowed the action to be convoluted from dividends to recapitalization.

It is evident in this instant action, that many of the MOPAC Class B stockholders who did not have the jurisdictional amount of $10,000 in damages could not be included and represented in the class action order signed by Judge van Pelt Bryan October 9, 1968 and consequently could not be bound by the judgment of Judge Edward Weinfeld, March 19, 1973, because of a recent decision of the United States Supreme Court No. 72-888 Zahn vs. International Paper Company decided December 17, 1973, and an earlier decision Snyder vs. Harris 394 U. S. 332 (1969) both resting on 28 U. S. C. § 1332 (a).

In Zahn supra the United States Supreme Court upheld the District Court 53 F.R.D. 430 (Vt. 1971.) and the Court of Appeals for the Second Circuit 469 F. 2d 1033 (CA 2 1972). Here it is important to note that both Judges Bryan and Weinfeld preside in the Second Circuit.

A review of the MOPAC Class B stockholders' list dated May 1, 1973 Exhibit 4 of the record reveals the following about the 922 Class B stockholders:

No. of Class B Shares Owned	Approx. No. of Class B Stockholder Owners	Percentage of Total Class B Stockholders
1 share	197	21.4 %
2 shares	113	12.25 %
3 shares	64	6.93 %
4 shares	18	1.95 %
4 or less	392	42.5 %
5 or less	558	60.5 %
10 or less	701	76.1 %

When Hon. Judge Van Pelt Bryan issued his class action order on October 9, 1968, there were "approximately 1,200 holders of Class B," and Alleghany Corporation was beneficial owner of 20,732 Class B shares of the total 39,731 Class B shares outstanding.

The Zahn Case (supra) from the Second Circuit should have controlled, and the judgment of the District Court

could not and should not be binding on the Class B stockholders who lacked the jurisdictional amount of $10,000.

A petition for a rehearing of this matter before the United States Supreme Court based upon new evidence has been filed this date by the undersigned petitioner.

Under Title 28 U. S. C. 1332 - Diversity of Citizenship; amount in controversy; costs - jurisdiction of the Federal District Court requires that there be $10,000 in controversy exclusive of costs and interest and in a class action, particularly of a spurious class type, each plaintiff member of the class must meet the jurisdictional amount. In the event that any member of the plaintiff class does not meet the jurisdictional amount of $10,000, the court has no jurisdiction over that particular plaintiff's claim.

Hence, the Court cannot enter a judgment for such a plaintiff lacking the jurisdictional amount and cannot enter a judgment binding such a plaintiff. The rights and obligations are not within the jurisdiction of the Federal District Court. The error of Judge Edward Weinfeld centers on this point. His judgment approving the stipulation of settlement dated March 19, 1973 (MOPAC Proxy Statement May 8, 1973 Pages D-1 through D-15) purports to bind Class B stockholders who did not have the jurisdictional amount, and this violates the judgment and reasoning of Zahn (supra.)

In fact, the judgment of Judge Weinfeld ran counter to the decision of his own circuit, which said "one plaintiff may not ride in on another's coattails." Zahn supra, (469 F. 2d 1033 at 1035.)

b. The Federal District Court had no jurisdiction to refer this congenitally defective MOPAC recapitalization plan to the stockholders and later to the Interstate Commerce Commission, and hence the Interstate Commerce Commission had no jurisdiction to hear it. Applied here is the rationale of Justice Frankfurter that if a plan is born without proper jurisdiction, it is imposed by fiat; and it matters not that the security holders might ultimately accept it if it were put to them for formal vote, the plan contains a congenital defect; and any interested party can object to its attempted effectuation when faced with this kind of Hobson's choice.

c. Further, Alleghany Corporation had no authority to enter a stipulation of settlement binding the small Class B stockholder because under the Jones Motor Co. decision of the Interstate Commerce Commission dated January 27, 1970, Alleghany's MOPAC Class B stock was under the continuing jurisdiction of the Interstate Commerce Commission. The decision further states, "The Commission in the future may either in response to a petition or on its own motion institute an investigation

to determine whether the trust should be continued or whether Alleghany's divestiture of MOPAC securities should be required." (109 MCC 333, Page 350 Alleghany Corporation - Control and Purchase Jones Motor Co., Inc. - and Control Erie Trucking Company No. MC-F-10444.)

Section 2. There are also serious questions of due process in the manner in which the Interstate Commerce Commission has used its plenary powers by ignoring the petitions of the undersigned and by truncating and abridging the hearing process.

a. On December 21, 1973 I mailed a petition for a stay of effective date of subject Report and received back a certified return receipt dated December 26, 1973. On December 27, 1973, the Office of the Secretary received from me by messenger, a supplementary petition dated December 26, 1973 for stay, presented to amplify the December 21, 1973 petition. To date these petitions have been ignored. Three other stockholders' petitions were acknowledged by Order, having service date December 28, 1973.

b. Legal opinion holds that the Commission erred and abused its plenary powers in making the service and effective dates of December 14, 1973 the same for subject Report and Order decided December 6, 1973. By the time it was received by the Class B dissident stockholders,

they were well into the activities of the Christmas season, and I was obliged to write my supplementary petition on Christmas Day. It is customary, under the rules, to allow thirty days between service date and effective date, in order to encourage, rather than frustrate, due process.

c. The Commission held hearings before Administrative Law Judge, William J. Gibbons, and at the last minute, as the hearings were beginning, the Class B dissident stockholders were informed that Judge Gibbons, who was presiding over the hearings, would not render a decision. The written order of this change was received by me a week later when I returned home from Washington, D. C. Because the administrative law judge's decision was omitted, the Class B stockholders have not been properly heard.

d. On April 19, 1973 I wrote a thirty-three page communication and study to the Director - Section of Finance, in protest of the recapitalization plan, and to ask for a hearing. I received back my certified mail receipt only. This communication was never answered, although I called the Commission several times by phone. I wrote to the Office of the Chairman on September 1, 1973, telling him of my plight, and had the letter delivered by messenger in order to get a copy receipted by the Chairman. The acting Chairman did answer the September 1, 1973 communication. This occurred after much petitioning and telephoning to the Commission by dissident Class B stockholders for a hearing

and after addressing ourselves to the Bureau of Enforcement on September 6, 1973.

e. The handling of this whole MOPAC matter must now be placed before the proper Congressional Investigating Committees, or someone in Washington who will take the responsibility of protecting individual citizen's property under the United States Constitution.

3. The main thrust of the dissent of the Class B stockholders is that their equity in the railroad is being reduced by 61 per cent as of December 31, 1972 and Sections 1 and 2 above indicate that this is being done without due process. It is apparent from reading pages 61 and 62, which deal with equity in subject Report, that the three Commissioners show little understanding of the concept of equity, or what they are doing to the Class B stockholders, in their decision.

a. There is no quarrel with the statement that the equity of the Class B stockholders will be reduced from 65.5 per cent to 25.5 per cent by the recapitalization plan upon full conversion of the new convertible preferred issued to the Class A stockholders. (MOPAC Proxy Statement May 8, 1973, page 11.) Mathematically, this is a 61 per cent reduction of equity as follows:

$$65.5 - 25.5 = 40 \text{ reduction}$$

$$\frac{40}{65.5} = 61\ \% \text{ reduction}$$

b. The Class B stockholders' equity is that which is left after deducting current liabilities, bond holders' claims, and the Class A stockholders' capital limited to $100 per share. The ownership in the railroad properties, after the aforementioned deductions are made, belongs to the Class B stockholders; and it is this ownership, from which earning power for Class B is also derived, that is being reduced by 61 per cent in this recapitalization.

c. In order to test the fairness of reducing this ownership by Court and Commission fiat, let us consider a hypothetical situation: Commissioners Tuggle, Deason and Mac Farland own a 100 room residential hotel and it is all rented and prospering, as is this MOPAC railroad. Now the second mortgage holders of the hotel enlist a court and a government agency by fiat to have the ownership of 61 rooms transferred from the three original owners to the account of the second mortgage holders. Consequently, the property and therefore the earning power of those 61 rooms has been diverted from the three owners to the second mortgage holders. I wonder if the three original owners would think this fair, and in keeping with the public interest?

Section 4. By no stretch of the imagination can it be deemed in the public interest to transfer 61 per cent of the ownership of the MOPAC railroad from the Class B stockholders to the concentrated corporate ownership and

control of Mississippi River Corporation through Class A shares in order to ameliorate the illegal ambitions of Alleghany Corporation under Section 5(4) of the Interstate Commerce Act. (See Chairman Stafford dissent, 109 MCC 333, 356-7.)

Section 5. My prayer for relief encompasses a plan which will not alter the equity of the Class B stockholders. I have presented such a plan to the Commission to show that there is an equitable solution, and it is on page 40 of subject Report and on Pages 22 - 24 of my Brief, dated October 15, 1973. I ask for reconsideration and a hearing before the full Commission.

Respectfully submitted,

William R. Wesson

William R. Wesson

WRW:AW

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of January, 1974, served this petition upon all parties of record in this proceeding by mailing a copy of this by first class mail, properly addressed to each party.

Service List

William R. McDowell, Esq.
900 Fidelity Union Tower
Dallas, Texas 75201

Gilbert P. Strelinger, Esq.
Missouri Pacific Building
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St. Louis, Missouri 63103

Carroll Neesoman, Esq.
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48 Wall Street
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Donovan Leisure Newton & Irvine
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New York, New York 10020

Robert S. Schacter, Esq.
Kass, Goodkind, Wecshsler and Gerstein
122 East 42nd Street
New York, New York 10017

Gerard M. Carey, Esq.
617 Third Street
Brooklyn, New York 11215

William R. Wesson

William R. Wesson

State of New Jersey

County of Ocean

Be it remembered that on this 11th day of January 1974 personally appeared before me, a notary public of New Jersey, William R. Wesson, to me known and known to me to be the individual described herein and who has sworn to and executed the foregoing Petition and he acknowledged to me that he executed the same.

Edwin A. Fuhr

A Notary Public of New Jersey

NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Jan. 28, 1977

SERVICE DATE

ORDER JANUARY 24 74

ENTERED
IN OFFICE DOCKET
1/24/74

#33

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 23rd day of January, 1974.

Finance Docket No. 27346

MISSOURI PACIFIC RAILROAD CO. SECURITIES

Upon consideration of the record in the above-entitled proceeding, including (1) the report and order of the Commission, Division 3, dated December 6, 1973, and served December 14, 1973, (2) the order of the Commission, Division 3, acting as an Appellate Division, dated December 27, 1973, denying petitions for extension of the effective date of said report and order, (3) telegram-communication from applicant, filed December 26, 1973, announcing extension of the consummation date from December 31, 1973, to January 31, 1974, and (4) petitions for reconsideration of said report and order filed by James C. Gabriel, Labelle Gillespie, Rollin W. Gillespie, William R. Wesson, and John Charles Vaiani, with, in addition, the petition of James C. Gabriel including a request for reconsideration by the entire Commission and the petition of John Charles Vaiani including a request for reopening of the proceeding for further hearing.

It appearing, That petitioners in their petitions for reconsideration raise issues totally unrelated to the statutory findings required to be made by this Commission in approving applications for authority to issue securities as provided in section 20a(2) of the Interstate Commerce Act; that some of the issues raised by petitioners deal with the legality of decisions in Levin et al v. Mississippi River Corporation, et al., 67 Civil 5095, dated March 19, 1973, _____ Fed. Supp. _____ (S.D.N.Y.) affirmed by the United States Court of Appeals for the Second Circuit in Levin et al., and William R. Wesson v. Mississippi River Corporation, et al., on June 12, 1973, _____ F. 2d _____ (2d Cir. 1973), alleging that the holding of the Appellate Court was merely an indication of its high regard for the judge of the lower court rather than a full consideration of his findings; the omission of a initial report by the Administrative Law Judge is alleged to be a violation of due process, notwithstanding the provisions of the Administrative Procedures Act, 5 U.S.C. 1007; the effective date provided by the report and order of Division 3, dated December 6, 1973, is alleged to be inappropriate, without regard to the fact that all appropriate petitions by the parties filed with this Commission for extension of effective date, and, as here, petitions for reconsideration are given full consideration prior to the implementation of the proposed reorganization plan; and the reorganization plan approved by this Commission in Missouri Pac. R. R. Reorganization, 290 I.C.C. 477, (1954) approved in In Re Missouri Pac. R.R., 129 F. Supp. 392 (E.D. Mo., 1955), affirmed sub nom. Missouri Pac. R. R. 5 1/4% S.S.B.C. v. Thompson, 225 F. 2d 761 (8th Cir. 1955), cert denied, 350 U.S. 959 (1956), is alleged to contradict the authority granted here, while the proceedings are not comparable, the proposal here was a possibility considered by this Commission and provided for then;

It further appearing, That, with respect to issues that are directly related to this proceeding, petitioners reargue matters such as the proposals they consider would be an equitable plan for the proposed reorganization, matters relating to the stockholders' meeting approving the plan of reorganization as proposed by the Missouri Pacific, and matters otherwise relating to allegations of fraud, conspiracy and acts of misconduct on the part of the Missouri Pacific, Mississippi River Fuel Corp., and their officers and directors, all of which have been fully considered and discussed in the report of the Commission; and that, the petitions otherwise set forth no new material facts or arguments of any substance which were not considered by Division 3, in its said report, which would indicate that the statutory findings heretofore made are either improper or inappropriate, or which warrant (a) reconsideration of the said report and order by Division 3, (b) special reconsideration of that report and order by the entire Commission, or (c) reopening of the proceeding for further public hearing:

It is ordered, That the petitions be, and they are hereby, denied.

By the Commission, Division 3, acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary.

(SEAL)

MISSOURI PACIFIC RAILROAD COMPANY

2206 Missouri Pacific Building
210 No. 13th Street, St. Louis, Missouri 63103
Telephone: (314) 622-0123

Proxy Statement

Dated May 8, 1973

For Special Meeting of Stockholders to be Held June 15, 1973

SUMMARY OF PROPOSED RECAPITALIZATION

This Proxy Statement is furnished in connection with the solicitation of proxies by the management of Missouri Pacific Railroad Company, a Missouri railroad corporation (the "Company"), for use at a special meeting of its stockholders to be held on June 15, 1973 (the "Special Meeting") and at any adjournment thereof.

The Special Meeting will be held to consider and vote upon a proposed Plan of Recapitalization annexed as Attachment A to this Proxy Statement (the "Plan") (pages A-1 through A-11), including a proposed Amendment to the Company's Articles of Association set forth in Exhibit 1 to the Plan (the "Amendment") (pages A-3 through A-11 of Attachment A), pursuant to which:

1. Each share of the Company's Class A Stock, without par value ("Class A Stock"), would be converted into one share of a new $5 Cumulative Convertible Preferred Stock, without par value ("Preferred Stock"). Each share of Preferred Stock would be convertible into one share of a new Common Stock without par value ("Common Stock"), after one year following issuance of an Interstate Commerce Commission order described below, would be subject to redemption at the option of the Company on and after January 1, 1976 and would not be entitled to preemptive rights. For a more complete description of the Preferred Stock, see pages 7-9 and for a summary of the principal differences between the Class A Stock and the Preferred Stock, see page 9.

2. Each share of the Company's Class B Stock, without par value ("Class B Stock"), would be converted into 16 shares of new Common Stock, plus a right to receive from the Company $850 in cash. The Common Stock would not be entitled to preemptive rights. For a more complete description of the Common Stock, see pages 10-11 and for a summary of the principal differences between the Class B Stock and the Common Stock, see page 11.

Members of the Board of Directors of the Company recommend approval of the Plan, as more fully described under "Recommendation of the Directors" at pages 3 and 4, which includes a description of the possible interests of the directors in the Plan. Because of the importance of the Plan to the Company and all stockholders, the Company has imposed special voting requirements for the special meeting which are described under "Voting" on page 2.

Submission of the Plan to stockholders of the Company for approval is being made as required by Missouri law and the Company's Articles of Association and in accordance with a Settlement Agreement, dated December 18, 1972 (the "Settlement Agreement"), pursuant to which a lawsuit by representatives of the Class B stockholders against the Company, Mississippi River Corporation, a Delaware corporation ("MRC"), and certain of their directors would be settled. The Settlement Agreement, annexed as Attachment C to this Proxy Statement, pages C-1 through C-11, contemplates the recapitalization of the Company, on the terms set forth in the Plan, and a tender offer by MRC, which presently holds a majority of the Class A Stock, for at least 400,000 shares of the new Common Stock at $100 per share. Alleghany Corporation, a Maryland corporation ("Alleghany"), which owns a majority of the Class B Stock and would own a majority of the new Common Stock, has agreed to tender its Common Stock to MRC, as a result of which MRC would become the owner of a majority of the Common Stock as well as of the Preferred Stock to be outstanding as a result of the Plan.

The Settlement Agreement has been approved by the United States District Court for the Southern District of New York as fair, reasonable and adequate with respect to the Company and the Class B stock-

holders. A copy of the opinion, dated March 19, 1973, of U. S. District Judge Edward Weinfeld is annexed hereto as Attachment D, pages D-1 through D-15. Since the holders of the Class A Stock as a class were not parties to the lawsuit, the Court, in approving the Settlement Agreement, did not make a determination as to the fairness, reasonableness or adequacy of the Plan to the holders of Class A Stock as a class. Approval of the Plan by vote of the holders of each of the two classes of stock is a condition to the settlement of the lawsuit pursuant to the Settlement Agreement. There are other conditions to the Plan as described under "Description of Plan of Recapitalization", including authorization by the Interstate Commerce Commission (the "ICC") of the issuance of the Preferred Stock and the Common Stock.

The Company's reasons for recommending the Plan and other changes is explained under "Reasons for Recapitalization and Other Changes in Securities" on pages 12 through 14. For information as to objections of certain stockholders, see page 14. The Court rejected these objections in approving the Settlement Agreement. See pages 14 through 16 and the Court's opinion at pages D-10 through D-14 of Attachment D.

VOTING

Unless otherwise specified, proxies received by the Company will be voted "FOR" the Plan. If a stockholder has appropriately specified how the proxy is to be voted, it will be voted in accordance with such specification. A stockholder may revoke his proxy at any time before the proxy is voted.

On May 1, 1973, 1,865,702 shares of the Class A Stock and 39,731 shares of the Class B Stock were outstanding. All such shares will be entitled to vote at the Special Meeting. Each share of Class A Stock and Class B Stock is entitled to one vote at the Special Meeting.

Under applicable law and the Company's Articles of Association, the vote of a majority of each class of the Company's stock would be required for approval of the Plan. However, the Board of Directors of the Company has determined that, because of the importance of the recapitalization to each stockholder and because the interest of the majority stockholder of each class may differ from the interests of the other stockholders of such class, the Plan will not be implemented unless it is approved by (a) the holders of 75% of the outstanding shares of the Class A Stock, including a majority of the shares of Class A Stock voted (other than shares known by the Company to be owned beneficially by MRC or Alleghany), and (b) the holders of 75% of the outstanding shares of Class B Stock, including a majority of the shares of Class B Stock voted (other than shares of Class B Stock known by the Company to be owned beneficially by MRC or Alleghany).

MRC, which owns 1,158,395 shares (approximately 62%) of the outstanding Class A Stock, has agreed in the Settlement Agreement to vote all such shares in favor of the Plan. Alleghany, which owns beneficially 21,243 shares (approximately 53%) of the outstanding Class B Stock and 2,200 shares of the Class A Stock, currently held by Franklin National Bank under a voting trust agreement, has agreed in the Settlement Agreement to use its best efforts to cause such shares to be voted in favor of the Plan.

Under the above voting requirements, holders (other than MRC and Alleghany) of at least 13% of the outstanding shares of Class A Stock and at least 22% of the outstanding shares of Class B Stock must vote in favor of the Plan if it is to be approved. In addition, a majority of the shares of Class A Stock and a majority of the shares of Class B Stock voted at the Special Meeting (other than shares known by the Company to be owned beneficially by MRC or Alleghany) must be voted in favor of the Plan if it is to be approved. Directors and officers of the Company own less than 1% of the outstanding shares of Class A Stock and no shares of Class B Stock.

Although the General and Business Corporation Law of Missouri provides certain appraisal rights to stockholders in corporate transactions similar to those contemplated by the Plan, the Missouri Railroad Corporation Law contains no such appraisal rights. In the opinion of Messrs. Bryan, Cave, McPheeters & McRoberts, counsel to the Company, stockholders of the Company have no appraisal rights in connection with the approval and adoption of the Plan.

As your vote is important, it is requested that you sign the enclosed proxy and mail it promptly in the return envelope provided. Shares cannot be voted at the Special Meeting unless the owner of record is present to vote or is represented by proxy.

RECOMMENDATION OF THE DIRECTORS

All directors of the Company recommend approval of the Plan. Thirteen directors indicated their approval at a meeting of the Board held on April 2, 1973. Two directors who were not in attendance and one director elected to the Board since such meeting, replacing a retiring director, have also expressly recommended approval.

The directors based their approval on their determination that the recapitalization of the Company as contemplated by the Plan is desirable to remove a source of conflict between different classes of stockholders and thereby to promote the welfare of the Company and all its stockholders. Such approval was further based on their belief that settlement of the aforementioned litigation, on the terms described herein as approved by the Court, is in the best interest of the Company and all of its stockholders.

In considering the Plan, the Board of Directors of the Company received the opinion, set forth below, of The First Boston Corporation, investment bankers, which is to receive a fee for rendering such opinion in an amount yet to be determined and not contingent upon stockholder approval or consummation of the Plan. In connection with rendering its opinion, The First Boston Corporation will be indemnified by the Company against certain liabilities, including liabilities under federal securities laws.

The First Boston Corporation has carried on business with the Company, MRC and Alleghany and its subsidiaries. During the five years and three months from January 1, 1968 to March 31, 1973, The First Boston Corporation has received commissions for acting as agent in securities transactions in an estimated amount averaging approximately $3,200 per year from the Company and $14,500 per year from subsidiaries of Alleghany. It has also regularly engaged, as principal, in a substantial volume of securities transactions with Alleghany and its subsidiaries, primarily involving sales to them of commercial paper. In addition, during this period, The First Boston Corporation co-managed a negotiated public offering of debt securities of a subsidiary of Alleghany in 1972, resulting in compensation to it of $53,000, and has had other business transactions with the Company and MRC involving small compensation.

The opinion of The First Boston Corporation is as follows:

May 8, 1973

Missouri Pacific Railroad Company
2206 Missouri Pacific Building
210 No. 13th Street
St. Louis, Missouri 63103.

Gentlemen:

In connection with the submission by Missouri Pacific Railroad Company (MoPac) to its stockholders of a Plan of Recapitalization (the Plan) as reflected in the Proxy Statement dated May 8, 1973, you have retained us to perform an independent evaluation as to the fairness of the Plan from the standpoint of the MoPac Class A stockholders, the MoPac Class B stockholders and MoPac itself.

In connection with this undertaking we have reviewed the MoPac Proxy Statement, including the financial statements contained therein and the Plan, the Settlement Agreement, the opinion, dated March 19, 1973, of the United States District Court for the Southern District of New York (the Court) approving the settlement, MoPac annual reports for the last five years and financial services relating to railroads generally. We have also reviewed certain documents submitted to the Court in connection with the hearing on the settlement of litigation contemplated by the Settlement Agreement. In that connection we have submitted affidavits to the Court in support of the settlement. We have taken into consideration the statements in the Proxy Statement and opinion of the Court, including various statements to the effect that effectuation of the Plan would eliminate the conflict which has existed between the holders of Class A Stock and the holders of Class B Stock, as a result of which MoPac has been hindered in the past in pursuing merger opportunities. We have also taken into consideration and are of the view that the Settlement Agreement and the Plan resulting therefrom were the result of long and hard arm's-length bargaining by sophisticated and informed adversary parties, and reflect a fair solution to an old controversy.

Our review has also taken into consideration the general condition of western railroads and the prospects of the railroad industry in the future, as reflected in various public documents.

Considering all of the foregoing, in our opinion the adoption of the Plan of Recapitalization is fair and equitable to the Class A stockholders, the Class B stockholders and MoPac itself.

THE FIRST BOSTON CORPORATION

Four directors of the Company are directors and officers of MRC. D. B. Jenks, Chairman of the Board of the Company, is President and Chief Executive Officer of MRC. Robert H. Craft, Chairman of the Finance Committee and a director of the Company, is Chairman of the Board and Chairman of the Finance Committee of MRC. Arthur W. Manley and Herbert Gussman are directors of MRC. Also, Thomas F. Milbank is a former director of MRC.

On May 1, 1973, Messrs. Jenks, Craft, Manley, Gussman, Milbank, S. M. Dixon, James M. Kemper, Jr. and Harold E. Thayer owned beneficially 1,123, 9,755, 11,236, 11,236, 4,944, 1,123, 196,631 and 500 shares, respectively, of the 9,069,289 shares of Common Stock of MRC outstanding on such date. In addition, Mr. Jenks held options expiring May 22, 1973 to purchase 16,000 shares of MRC Common Stock at $20 per share and options expiring July 12, 1976 to purchase 25,000 shares of MRC Common Stock at $13.75 per share. On May 1, 1973, the reported last sale price of MRC Common Stock on the New York Stock Exchange was $15.625.

On February 22, 1973, MRC granted to Messrs. J. H. Lloyd and M. M. Hennelly, directors and President and Vice President, respectively, of the Company five-year stock options, exercisable 20% a year, to purchase 10,000 shares each of Common Stock of MRC at $16.875 per share. In connection therewith, MRC and each of such individuals have entered into employment contracts providing for their employment with the Company.

On May 8, 1973, Mr. Manley's term as a director expired and Mr. Thomas H. O'Leary, Vice President-Finance of the Company and a director and Executive Vice President of MRC, was elected a director of the Company. On such date Mr. O'Leary owned 200 shares of MRC Common Stock and held options expiring February 26, 1974 to purchase 5,000 shares of MRC Common Stock at $25.75 per share, options expiring May 26, 1976 to purchase 5,000 shares at $14 per share, options expiring May 24, 1977 to purchase 5,000 shares at $16.375 per share and options expiring February 21, 1978 to purchase 10,000 shares at $16.875 per share, the latter options having been granted to Mr. O'Leary on February 22, 1973.

Messrs. Craft, Milbank and T. C. Davis, directors of the Company, are defendants in the lawsuit which is the subject of the Settlement Agreement. The Company expects that settlement of the lawsuit will extinguish all claims against such individual defendants based upon, or which could be based upon or arise from, any of the matters alleged in the complaints. The Settlement Agreement imposes no obligations upon any of the individual defendants by way of payment to plaintiffs or otherwise.

Insofar as MRC is the owner of approximately 61% of all outstanding stock of the Company, it is able to effect the selection of any director of the Company. Therefore, stockholders should review carefully the terms and provisions of the Plan and reach their own conclusions independently of the approval and recommendation of the Plan by the members of the Board.

DESCRIPTION OF PLAN OF RECAPITALIZATION

The Plan provides for a recapitalization of the Company through the creation of the Preferred Stock and the Common Stock, the conversion of the Class A Stock into Preferred Stock, the conversion of the Class B Stock into Common Stock and rights to receive cash, and other changes in the Articles of Association of the Company, all as more fully described below.

The recapitalization, if approved, will be accomplished by the filing of the Amendment with the proper authorities of the State of Missouri, followed by its effectiveness under Missouri law.

Under the Plan, the Amendment will not be filed unless (a) the requisite stockholder approval set forth under "Voting" above is obtained, (b) authorization by the ICC of the issuance of the Preferred Stock and the Common Stock to be outstanding upon the effectiveness of the Amendment and the shares of Common Stock to be issuable upon conversion of such Preferred Stock (and any other matters which may require prior ICC authorization) is obtained, (c) MRC shall have made a tender offer as described below, and (d) the actions to be taken at the closing (the "Closing") described in the Settlement Agreement, as described below, shall have taken place.

Litigation and Settlement Agreement

The Settlement Agreement settles an action in the United States District Court for the Southern District of New York commenced on December 29, 1967, by Betty Levin ("Levin"), the holder and owner of 320 shares of Class B Stock. In 1968 Robert LeVasseur ("LeVasseur"), the holder and owner of 300 shares of Class B Stock, and Alleghany, the beneficial owner of 21,243 shares of Class B Stock, a majority of the Class B Stock outstanding, were granted leave to intervene in the action as additional plaintiffs. By order dated October 9, 1968, the Court determined the action to be a class action on behalf of all holders of Class B Stock. Plaintiffs Levin and LeVasseur also purport to maintain their actions derivatively on behalf of the Company.

The defendants in the action are MRC, holder of a majority of the outstanding Class A Stock, the Company and Robert H. Craft, T. C. Davis and Thomas F. Milbank, present or former directors of the Company and, in the case of Messrs. Craft and Milbank, MRC. The defendants have filed answers in the action denying all claims asserted by the plaintiffs and any liability on account thereof and have interposed affirmative defenses to the claims. Summaries of claims and defenses in the lawsuit are contained in the notice of hearing and court opinion referred to below.

On January 25, 1973, a hearing was held before Judge Edward Weinfeld for the purpose of determining the fairness and reasonableness of the settlement to holders of the Class B Stock and to the Company. A notice of the hearing containing excerpts of the Settlement Agreement was mailed on December 27, 1972 to all holders of record of the Class A Stock and the Class B Stock at the close of business on December 26, 1972, and a notice containing a summary of the Settlement Agreement was published in the national edition of the *The Wall Street Journal* on December 27, 1972. Such notices were in a form approved by the Court and contained a description of the litigation and of the proposed settlement and informed stockholders of their right to be heard at the hearing on all questions related to the settlement. At the hearing an opportunity was afforded all parties to the litigation and all stockholders of the Company to be heard in support of or opposition to the settlement. See "Certain Objections to Proposed Recapitalization" below. After the hearing, by order dated March 19, 1973, the Court approved the settlement as fair, reasonable and adequate to holders of the Class B Stock and to the Company, and a judgment was entered on May 2, 1973 dismissing the action with prejudice as to all defendants.

The full text of the Court's opinion is annexed hereto as Attachment D. The Court describes in its opinion the history of the voting rights litigation of the Company (at pages D-2 to D-3) and describes the lawsuit which is the subject of the Settlement Agreement (at pages D-3 to D-4).

If the Closing is not consummated by December 31, 1973, the Settlement Agreement may be terminated at the option of the Company, MRC or Alleghany, and the judgment may be reopened. If the settlement is consummated, the Company expects that the judgment will be binding upon it and upon all holders of Class B Stock and will extinguish all claims based upon, or which could be based upon, or arise from, any of the matters alleged in the complaints and will relieve all defendants, including the individual defendants, of all liability for conduct alleged therein. In the Settlement Agreement the Company and MRC agreed to pay attorneys' fees which may be awarded by the Court after the judg-

ment becomes final. As noted in the Court's opinion (p. D-14), application for attorneys' fees will be the subject of a separate hearing after notice. Alleghany has indicated that it will apply for an award of fees of $850,000, and counsel for plaintiffs Levin and LeVasseur have indicated that they will apply jointly for an award of fees of $6,953,000. The Company and MRC have indicated that they will vigorously oppose the joint application by counsel for plaintiffs Levin and LeVasseur.

Virtually all discovery has been completed in the action and, if the settlement is not consummated, the action will thereafter proceed to trial for a determination by the Court of the merits of plaintiffs' claims and defendants' defenses.

Procedures under the Settlement Agreement

The Company has applied to the ICC for authority to issue the Preferred Stock and Common Stock. If stockholders approve the Plan and the ICC issues a final order authorizing such issuance of the Preferred Stock and the Common Stock, MRC will make a cash tender offer for 400,000 shares (approximately 63%) of the Common Stock to be issued, at $100 per share. Alleghany has agreed that it will tender all of its new Common Stock (339,888 shares) to MRC. If 400,000 or fewer shares are tendered, MRC must accept all such tendered shares and, if more than 400,000 shares are tendered, tenders will be accepted by MRC pro rata unless it should decide to accept all shares tendered. On the fifth business day following completion of the tender offer by MRC, the Closing will be held, in connection with which the Amendment will be filed and become effective, and delivery of certificates for shares of Preferred Stock and Common Stock and payment of cash pursuant to the Plan and the tender offer will be made to all stockholders of the Company in attendance who properly tender certificates. A similar delivery and payment will be made to other stockholders of the Company after the Closing upon surrender of certificates representing shares of Class A and Class B Stock. See "Certain Restrictions Imposed Until Surrender of Certificates" below. There are certain other conditions to the obligations of the various parties at the Closing, including MRC's having available to it the necessary financing to consummate its tender offer (commitments for which MRC has already obtained), the delivery of legal opinions relating to the transactions contemplated by the Settlement Agreement, and a determination by Alleghany as to the inapplicability of Section 16(b) of the Securities Exchange Act of 1934 and of the Investment Company of 1940 to it and by MRC as to the inapplicability of such Section 16(b) to it in respect of certain of such transactions.

The recapitalization of the Company pursuant to the Plan and the tender offer by MRC are mutually dependent obligations, neither of which may be effected without the other.

The Board of Directors of the Company has indicated in the Settlement Agreement that it anticipates that, subject to business conditions and the financial condition and results of operations of the Company, it will be in a position to authorize the payment of quarterly dividends of $1.25 per share on the Preferred Stock and a quarterly dividend of at least $1.25 per share on the Common Stock, following the Closing.

Among the many factors to be considered by the Board of Directors in declaring any such dividend will be the cash position of the Company. Although cash demands will increase as a result of consummation of the Plan through required payments of principal and interest on up to $30,000,000 of advances incurred in connection with the cash payment of $850 in respect of each share of the Class B Stock and as a result of the expected increase in the amount of dividends paid annually by the Company, the Board of Directors now anticipates that the cash position of the Company should prove sufficient to pay dividends in the amounts set forth above.

AMENDMENT OF ARTICLES OF ASSOCIATION

The Amendment (a) creates the new classes of Preferred Stock and Common Stock as the only classes of stock of the Company and converts all of the outstanding shares of Class A Stock and Class B Stock into Preferred Stock and Common Stock, respectively, on the terms above described;

(b) deletes a provision of the Articles of Association providing preemptive rights to stockholders of the Company; and (c) deletes a provision of the Articles of Association requiring a class vote in certain situations. These matters are discussed in greater detail below.

The following statements with respect to the present Articles of Association, including the discussion of the Class A Stock and the Class B Stock, and the Amendment, including the description of the Preferred Stock and the Common Stock, are summaries of the detailed provisions of the Articles of Association, relevant portions of which are attached hereto as Attachment B, and the Amendment, the form of which is included as Exhibit 1 to Attachment A hereto, and the following is qualified in its entirety by reference to such provisions.

Description of Preferred Stock

General. Upon effectiveness of the Amendment under Missouri law, the Company will be authorized to issue 2,000,000 shares of Preferred Stock, and the outstanding shares of Class A Stock will be converted, one-for-one, into shares of Preferred Stock. The Board of Directors will be authorized to issue the authorized but unissued shares of Preferred Stock for lawful consideration in such manner, at such time or times, at such price or prices and on such other terms and conditions as it may determine and the ICC may approve.

Dividend Rights. The Preferred Stock, in preference to the Common Stock, will be entitled to receive cumulative cash dividends at the rate of $5.00 per share per annum, and no more, when and as declared by the Board of Directors out of funds legally available for such payment. Dividends on the Preferred Stock will accrue from the date of original issuance of each share.

Provisions of constituent instruments of certain of the Company's long-term debt restrict payments of dividends on, and redemptions, purchases and retirements of, the Company's capital stock. Three of such instruments contain restrictions whereby the Company is required to designate from what funds and calendar years dividends are being declared. It may not pay dividends out of Available Net Income (as defined) for any calendar year or out of surplus for any calendar year unless Available Net Income for such calendar year is sufficient to pay certain contingent charges with respect to such year. Available Net Income is or was the income of the Company consolidated with its wholly-owned railroad subsidiaries, after taxes and fixed charges, calculated on the basis of ICC accounting. Since Available Net Income was so sufficient in all preceding years, at least $83,468,000 of the Company's surplus as of December 31, 1972, on a pro forma basis reflecting consummation of the Plan, is unrestricted under such instruments. See "Pro Forma Capitalization" and "Computation and Application of 'Available Net Income'" elsewhere in this Proxy Statement.

In addition, a bank loan agreement, pursuant to which the Company has arranged for borrowings of up to $30,000,000 to finance the payment of $850 per share to holders of Class B Stock (see "Pro Forma Capitalization"), provides that the Company may not make "restricted payments" (principally dividends or distributions on, or purchases or retirements of, capital stock) unless, immediately thereafter, the amount of all such restricted payments since December 31, 1972 would not exceed the sum of $12,500,000 plus 50% of Consolidated Net Income since December 31, 1972 up to $25,000,000, 55% of the next $5,000,000 of Consolidated Net Income since December 31, 1972 and 60% of the excess of Consolidated Net Income since December 31, 1972 over $30,000,000. Consolidated Net Income is defined therein as the consolidated net income of the Company and its subsidiaries on an ICC accounting basis.

So long as any Preferred Stock is outstanding, no dividend (except in Common Stock) may be paid or declared or any distribution made on the Common Stock, and no Common Stock may be purchased, retired or otherwise acquired by the Company, unless all accrued dividends on the Preferred Stock for all preceding periods shall have been paid and a dividend in the amount of $1.25 per share on the Preferred Stock in respect of the then current quarter has been paid, or declared and a sum sufficient for the payment thereof set aside, and then only if the net assets of the Company would be equal to at least $100 for each share of outstanding Preferred Stock.

Redemption. On and after January 1, 1976, the Company, at the option of its Board of Directors, may redeem the Preferred Stock, as a whole at any time or in part from time to time, upon at least 30 days' notice, at a redemption price of $100 per share plus accrued dividends. In case less than all the shares are to be redeemed, the shares to be redeemed shall be designated by lot or such other method as the Board of Directors deems fair.

Conversion Rights. At any time after the opening of business on the first anniversary of the issuance by the ICC of a final order approving issuance of the Preferred Stock and the Common Stock and any related transactions and prior to redemption, each share of Preferred Stock will be convertible into Common Stock at an initial conversion price of $100 per share of Common Stock (subject to adjustment as described below), with each share of Preferred Stock being taken as equivalent to $100. The Amendment contains provisions designed to protect holders of Preferred Stock against dilution of their conversion rights. This is accomplished by adjusting the conversion price on the basis of which the number of shares of Common Stock to be received upon conversion is determined. Such conversion price is initially $100 per share of Common Stock. Such conversion price is (1) subject to adjustment under a formula in certain events, including issuance of Common Stock for a consideration per share less than the conversion price, Common Stock dividends amounting to 5% or less of the outstanding shares of Common Stock, and other dividends, except dividends in cash out of earned surplus (with credit under the conversion formula for sales of Common Stock above the conversion price) and (2) subject to immediate proportional adjustment if the Common Stock is subdivided or combined or in the case of Common Stock dividends of more than 5%. No adjustment under the formula, however, is to be made until cumulative adjustments in the conversion price amount to $1.00 (or such amount as adjusted). Fractional shares of Common Stock will not be issued upon conversion, but, in lieu thereof, the Company will make adjustment for fractional interests in cash. No payment or adjustment will be made upon any conversion on account of any dividends accrued on the shares of Preferred Stock surrendered for conversion or on account of any dividends on the Common Stock issued upon conversion.

Liquidation. In the event of any liquidation, dissolution or winding up of the affairs of the Company (mergers, consolidations and transfers of all or any part of the assets of the Company not being included in such terms), holders of the Preferred Stock will be entitled to receive $100 per share, plus accrued dividends, before any distribution or payment may be made to holders of the Common Stock.

Voting Rights. Each share of Preferred Stock and each share of Common Stock will be entitled to one vote per share. Holders of the Preferred Stock and the Common Stock will be entitled to cumulative voting rights in the election of directors. While dividends on the Preferred Stock are accumulated and unpaid in an amount equal to or exceeding $7.50 per share, the holders of the Preferred Stock, voting separately as a class at annual stockholders' meetings, will have the right to elect two directors and the holders of the Preferred Stock and the Common Stock, voting together as a single class, will have the right to elect the remaining directors.

Under Missouri law (as presently in effect), the Company's Articles of Association (after effectiveness of the proposed Amendment) and its By-Laws, stockholders act by a vote of a majority of the shares of stock entitled to vote, except that (a) the affirmative vote of holders of at least two-thirds of the outstanding shares is necessary for the Company (i) to merge or consolidate with any company (other than with certain other railroad companies organized under Missouri law, in respect of which the vote of holders of a majority in interest of all the stock held in each company is required) or (ii) to dissolve the Company; (b) any amendment to the Company's Articles of Association which "increases shares" requires the affirmative vote of persons holding a "larger amount in value" of the outstanding shares; (c) any amendment to the Company's Articles of Association which creates or increases preferential shares requires the affirmative vote of holders of a majority of all outstanding shares; and (d) a class vote is required as discussed in the next paragraph.

Under Missouri law, as presently in effect, holders of the Preferred Stock will be entitled to vote as a class with respect to any amendment to the Articles of Association which would (a) adversely change the preferences, priorities, special rights or powers of any class of stock, (b) classify or reclassify outstanding shares of any class, (c) authorize shares having superior preferences, (d) provide that shares of

a class may be convertible into shares of a different class or different series of the same class, or (e) alter the terms or conditions of shares of any class which are either (i) convertible or (ii) issuable upon conversion. In the foregoing situations, the affirmative vote of holders of 75% of the outstanding shares of each class so affected will be required, in addition to the vote otherwise required.

Preemptive Rights. Holders of the Preferred Stock will have no preemptive or preferential rights to purchase any security of the Company.

Nonassessability. The shares of Preferred Stock to be outstanding upon the effectiveness of the Amendment under Missouri law will be fully paid and not liable to assessment.

Listing. The Class A Stock is presently listed on the New York Stock Exchange. The Company, in the Settlement Agreement, has agreed to use its best efforts promptly after the Closing and for a period of five years thereafter to cause the Preferred Stock to be listed on the New York Stock Exchange, if during such time the Exchange's requirements for listing are met. The Company is discussing with the Exchange the listing of the Preferred Stock. The Company does not now know whether the Preferred Stock will be listed on the Exchange. Because of the organized market represented by a national securities exchange, a listed security may have greater marketability than an unlisted security.

Summary of Principal Differences Between Class A Stock and Preferred Stock

The principal differences between the Class A Stock and the Preferred Stock are as follows: (1) the Preferred Stock will be convertible into shares of Common Stock, whereas the Class A Stock is not convertible into Class B Stock; (2) the Preferred Stock will be subject to redemption by the Company, whereas the Class A Stock is not; (3) dividends on the Preferred Stock will be cumulative, whereas dividends on the Class A Stock are not; (4) the Preferred Stock will have no preemptive rights, whereas the Class A Stock has preemptive rights to purchase additional shares of Class A Stock, or securities convertible into, or exchangeable for, Class A Stock; and (5) the voting rights of holders of the Preferred Stock will be different from the voting rights of holders of the Class A Stock as summarized below.

Because 16 shares of Common Stock will be issued for each share of Class B Stock outstanding, the percentage of total voting shares held by Class A stockholders, who will become holders of Preferred Stock, will be reduced from approximately 98% to approximately 75%.

The Company's present Articles of Association expressly provide that the Company may not, without the consent of the holders of record of at least a majority of the shares of Class A Stock then outstanding and at least a majority of the shares of Class B Stock then outstanding, (a) issue any additional shares of stock of any class, (b) create or issue any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of Class A Stock or Class B Stock, or (d) amend or eliminate any of the foregoing provisions. As interpreted by the Supreme Court of the United States in prior litigation involving the Company, the Company may not take any action which has such a result, including certain mergers or consolidations, without a class vote.

A principal effect of the Amendment will be that a class vote will be required only in the case of those amendments to the Company's Articles of Association described above under "Voting Rights" (and in cases of certain dividend arrearages on the Preferred Stock), and mergers, consolidations and other corporate actions which do not so amend the Articles of Association will not require a class vote. As a further result, a class vote will no longer automatically be required for the issuance of all additional shares of stock.

Description of Common Stock

General. Upon effectiveness of the Amendment, the Company will be authorized to issue 3,000,000 shares of Common Stock and each outstanding share of Class B Stock will be converted into 16 shares of Common Stock plus a right to receive $850 in cash. Initially, 635,696 shares of Common Stock will be outstanding, 1,865,702 shares will be reserved for conversion of Preferred Stock and 498,602 will be authorized but unissued and unreserved.

Dividend Rights. Holders of Common Stock will be entitled to such dividends as may be declared by the Board of Directors out of funds legally available therefor.

So long as any Preferred Stock is outstanding, no dividend (except in Common Stock) may be paid or declared or any distribution made on the Common Stock, and no Common Stock may be purchased, retired or otherwise acquired by the Company, unless all accrued dividends on the Preferred Stock for all preceding periods have been paid and a dividend in the amount of $1.25 per share on the Preferred Stock in respect of the then current quarter has been paid, or declared and a sum sufficient for the payment thereof set aside, and then only if the net assets of the Company would be equal to at least $100 for each share of outstanding Preferred Stock.

Provisions of constituent instruments of certain of the Company's long-term debt restrict payments of dividends on, and redemptions, purchases and retirements of, the Company's capital stock. Three of such instruments contain restrictions whereby the Company is required to designate from what funds and calendar years dividends are being declared. It may not pay dividends out of Available Net Income (as defined) for any calendar year or out of surplus for any calendar year unless Available Net Income for such calendar year is or was sufficient to pay certain contingent charges with respect to such year. Available Net Income is the income of the Company consolidated with its wholly-owned railroad subsidiaries, after taxes and fixed charges, calculated on the basis of ICC accounting. Since Available Net Income was so sufficient in all preceding years, at least $83,468,000 of the Company's surplus as of December 31, 1972, on a pro forma basis reflecting consummation of the Plan, is unrestricted under such instruments. See "Pro Forma Capitalization" and "Computation and Application of 'Available Net Income'" elsewhere in this Proxy Statement.

In addition, a bank loan agreement, pursuant to which the Company has arranged for borrowings of up to $30,000,000 to finance the payment of $850 per share to holders of Class B Stock (see "Pro Forma Capitalization"), provides that the Company may not make "restricted payments" (principally dividends or distributions on, or purchases or retirements of, capital stock) unless, immediately thereafter, the amount of all such restricted payments since December 31, 1972 would not exceed the sum of $12,500,000 plus 50% of Consolidated Net Income since December 31, 1972 up to $25,000,000, 55% of the next $5,000,000 of Consolidated Net Income since December 31, 1972 and 60% of the excess of Consolidated Net Income since December 31, 1972 over $30,000,000. Consolidated Net Income is defined therein as the consolidated net income of the Company and its subsidiaries on an ICC accounting basis.

Liquidation. In the event of any liquidation, dissolution or winding up of the affairs of the Company (mergers, consolidations and transfers of all or any part of the assets of the Company not being included in such terms), holders of the Common Stock will be entitled, after payment of $100 per share of Preferred Stock, plus accrued dividends, to the holders of Preferred Stock, to their pro rata share of the balance, if any, of the net assets of the Company.

Voting Rights. Each share of Common Stock and each share of Preferred Stock will be entitled to one vote per share. Holders of Common Stock and Preferred Stock will be entitled to cumulative voting rights in the election of directors. While dividends on the Preferred Stock are accumulated and unpaid in an amount equal to or exceeding $7.50 per share, the holders of the Preferred Stock, voting separately as a class at annual stockholders' meetings, will have the right to elect two directors and the holders of the Preferred Stock and the Common Stock, voting together as a single class, will have the right to elect the remaining directors.

Under Missouri law (as presently in effect), the Company's Articles of Association (after effectiveness of the proposed Amendment) and its By-Laws, stockholders act by a vote of a majority of the outstanding shares of stock entitled to vote, except that Missouri law imposes higher voting requirements in those cases described under "Description of Preferred Stock—Voting Rights". The rights of holders of Common Stock to vote as a class will be the same as the rights of holders of Preferred Stock described under such caption, except as otherwise specifically stated therein, including the right of holders of the Preferred Stock to elect two directors in the case of certain arrearages in the payment of dividends.

Preemptive Rights. Holders of Common Stock will have no preemptive or preferential rights to purchase any security of the Company.

Nonassessability. The shares of Common Stock to be outstanding upon the effectiveness of the Amendment and the shares of Common Stock initially issuable upon conversion of the Preferred Stock (when so issued) will be fully paid and not liable to assessment.

Listing. The Common Stock will not initially be listed on any stock exchange. The Company, in the Settlement Agreement, has agreed to use its best efforts promptly after the Closing and for a period of five years thereafter to cause the Common Stock to be listed on the New York Stock Exchange, if during such time the Exchange's requirements for listing are met. Because of the probable limited distribution of the Common Stock, there can be no assurance that during such time listing of the Common Stock can be accomplished.

The Class B Stock is not presently listed on any stock exchange.

Miscellaneous. The Common Stock is not entitled to any conversion right and is not subject to redemption.

Summary of Principal Differences Between Class B Stock and Common Stock

The principal differences between the Class B Stock and the Common Stock are as follows: (1) the Common Stock will have no preemptive rights, whereas the Class B Stock has preemptive rights to purchase additional shares of Class B Stock, or securities convertible into, or exchangeable for, Class B Stock; and (2) the voting rights of holders of the Common Stock will be different from the voting rights of holders of the Class B Stock in the same manner as the voting rights of holders of the Preferred Stock will differ from voting rights of holders of the Class A Stock. See "Description of Preferred Stock—Voting Rights" and "Summary of Principal Differences Between Class A Stock and Preferred Stock".

Because 16 shares of Common Stock will be issued for each share of Class B Stock outstanding, the percentage of total voting shares held by Class B stockholders, who will become holders of Common Stock, will be increased from approximately 2% to approximately 25%.

It has been contended that, inasmuch as the Preferred Stock will be convertible into Common Stock, the equity of the Company owned by the original holders of Common Stock will be diluted as conversions take place and the book value per share of Common Stock will be subject to dilution to the extent that, at the time of conversion, such book value exceeds $100 per share (or the adjusted conversion price of the Preferred Stock in effect at the time of conversion).

As of December 31, 1972 34.5% of the consolidated stockholders' equity of the Company on an ICC accounting basis was attributable, in the event of liquidation, to the Class A stockholders (being the liquidation value of their stock) and the remaining 65.5% of such stockholders' equity was attributable to the Class B stockholders as the holders of residual rights to the assets of the Company upon liquidation. If no conversions of the Preferred Stock take place, the comparable percentages upon consummation of the Plan would be 36.7% and 63.3%, respectively. Assuming conversion of all the Preferred Stock to be outstanding upon consummation of the Plan, the percentage of such stockholders' equity upon liquidation attributable to the initial holders of the Preferred Stock (the former Class A stockholders) would increase to 74.5% and that attributable to the initial holders of the Common Stock (the former Class B stockholders) would decrease to 25.5%.

FEDERAL INCOME TAX CONSEQUENCES

In the opinion of Messrs. Sullivan & Cromwell, special counsel to the Company, the Federal income tax consequences to the holders of the Class A Stock and the Class B Stock resulting from the Plan will be as follows:

Holders of Class A Stock

No gain or loss will be recognized to a holder of Class A Stock upon the exchange of his Class A Stock for Preferred Stock. The tax basis (used for computing gain or loss upon an eventual sale or exchange) of the Preferred Stock received by the Class A stockholder will be the same as the basis of the Class A Stock exchanged therefor. The holding period of the Preferred Stock received will include the holding period of the Class A Stock, if the Class A Stock was a capital asset in the hands of the Class A stockholder.

Under existing law, no gain or loss will be recognized to any holder of Preferred Stock upon the conversion of his Preferred Stock into Common Stock, except to the extent that cash is received in lieu of fractional shares.

Holders of Class B Stock

The $850 in cash per share distributed pursuant to the Plan to a holder of Class B Stock will be taxed as ordinary income.

No gain or loss will be recognized to a holder of Class B Stock upon the exchange of his Class B Stock for Common Stock. The tax basis of the Common Stock received by the Class B stockholder will be the same as the basis of the Class B Stock exchanged therefor. The holding period of the Common Stock received will include the holding period of the Class B Stock, if the Class B Stock was a capital asset in the hands of the Class B stockholder.

Gain or loss recognized as a result of the sale of Common Stock pursuant to the tender offer of MRC will be taxed as a capital gain or loss if the Common Stock sold was a capital asset. Such gain or loss will be a long-term capital gain or loss if the Common Stock sold is treated as having been held for more than six months.

REASONS FOR RECAPITALIZATION AND OTHER CHANGES IN SECURITIES

The recapitalization and the tender offer are designed to eliminate a source of conflict between the different classes of the Company's stockholders and thereby promote the interests of the Company and all its stockholders. The Company regards the deletion of preemptive rights and the change in voting rights as desirable changes for the reasons set forth below, but does not regard them as essential to the settlement of the lawsuit described under "Description of Plan of Recapitalization—Litigation and Settlement Agreement".

Recapitalization. Under the Company's present Articles of Association, as interpreted by the Supreme Court of the United States, certain amendments to the Articles of Association and approvals of most mergers and consolidations require separate class votes of the Class A Stock and the Class B Stock. Under present circumstances, MRC owns a majority of the outstanding shares of Class A Stock and Alleghany owns a majority of the outstanding shares of Class B Stock. Accordingly, the above-mentioned corporate action cannot be taken without the concurrence of both MRC and Alleghany. In the litigation which is the subject of the Settlement Agreement, Alleghany and other Class B stockholders have contended that MRC has misused its voting control over the Company's Board of Directors to keep dividends on the Class B Stock unreasonably low, to favor MRC and other Class A stockholders at the expense

of the Class B stockholders and to "freeze out" the Class B stockholders. Alleghany and the other Class B stockholders are in a position to block major corporate action of the types indicated above. The proposed recapitalization, together with MRC's tender offer and Alleghany's acceptance thereof, would settle the litigation and give MRC a majority of both the Preferred Stock and the Common Stock. This would eliminate the present impediment to effective major corporate action and a source of conflict and potential future litigation. As the Court stated in its opinion (at page D-15 of Attachment D hereto), "[The Plan] offers a permanent solution to the long standing impasse between the two contending groups of stockholders—a result that cannot be achieved through successful litigation. Indeed, continued litigation may be said to be an exercise in futility since the hard core of the cause of the differences between the two groups would remain and continue to plague them and MoPac. The settlement will afford MoPac the opportunity to pursue merger prospects so vital to its economic growth and existence and to permit its officials to give full time and attention to corporate affairs."

The Company has from time to time received indications of interest from other companies as to possible consolidations, mergers or other forms of business combination. Because of its present capital structure it has been unable to respond effectively to such proposals. The proposed recapitalization, together with MRC's tender offer and Alleghany's acceptance thereof, will enable the Company to respond effectively to any such proposals. The Company is not presently discussing or negotiating with anyone with respect to any consolidation, merger or other business combination. If and when the Board of Directors receives a proposal which it is prepared to recommend to stockholders, the matter will be submitted to stockholders for their approval.

In February, 1973, in the *Union Pacific-Rock Island* merger proceeding, an ICC Administrative Law Judge issued a report recommending an extensive restructuring of railroads in the western part of the United States, including a takeover of the Company and its 97% owned subsidiary Texas and Pacific Railway Company by the Santa Fe railroad. The ICC lacks the power to compel the Company and its subsidiary to combine with the Santa Fe. The Company is studying the report but has had no discussions with Santa Fe concerning the recommendation contained in the report. The report is now before the ICC for consideration, the ICC having denied a petition submitted by the Company, one of its subsidiaries and other railroad intervenors which sought an order dismissing the proceedings. Although the Company believes mergers are vital to its own growth and are important for most western railroads, it disagrees with the specific proposal of the ICC Administrative Law Judge.

To protect the present Class A stockholders who would become holders of Preferred Stock against actions that might be considered adverse to their interests or unduly favorable to the holders of Common Stock, their preferred dividend rights would be made cumulative and they would be given a future right to convert their Preferred Stock into Common Stock on a one-for-one basis. To enable the Company to simplify its capital structure, the Company would be given the right, after 1975, to redeem the Preferred Stock, but holders of the Preferred Stock would be entitled to receive $100 per share plus accrued dividends or, if they prefer, to convert their Preferred Stock into Common Stock.

The excess of 498,602 shares of Common Stock over the amount necessary to convert Class B Stock into Common Stock on the terms proposed and to allow for conversions of Preferred Stock into Common Stock is designed to allow the Company a greater flexibility in issuances and sales of its stock, subject to the approval of the Board of Directors and the ICC.

Preemptive Rights. Preemptive rights enable stockholders to preserve their proportionate interests and voting rights in a corporation. To the extent that a corporation's stock is widely held and traded, a stockholder may maintain his proportionate interest and voting rights in the corporation through market purchases and preemptive rights are not necessary. Therefore, the Company does not believe that preemptive rights confer a benefit to its stockholders which is useful, considering the aforementioned factors.

Furthermore, the existence of such rights may be costly and disadvantageous if the Company seeks additional capital through issuance and sale of stock. A rights offering to stockholders involves more expense than an immediate sale of shares to underwriters.

Change in Voting Rights. The provisions of the present Articles of Association governing voting rights, which date from the emergence of the Company from reorganization, were designed to protect the relative rights of the Class A Stock and Class B Stock held by divergent stockholder groups with possibly conflicting interests. The recapitalization, which would transform the existing classes of stock into more customary preferred and common stock, and the combination of control of both classes of stock in the hands of MRC, present a favorable opportunity to eliminate the somewhat specialized voting rights of the Class A Stock and Class B Stock and to give to the holders of Preferred Stock and Common Stock the rights to vote as a class to which they are entitled under Missouri law in the absence of special voting provisions in the Articles of Association.

CERTAIN OBJECTIONS TO PROPOSED RECAPITALIZATION

At the hearing on the Plan described under "Description of Plan of Recapitalization—Litigation and Settlement Agreement" or by letter to the Court, 18 Class B stockholders, representing a total of approximately 1,167 shares of Class B Stock, two Class A stockholders representing a total of 100 shares of Class A Stock and one debentureholder objected to approval of the Plan. The objections of Class B stockholders were primarily based on the alleged inadequacy of the proposed exchange for their holdings, its tax consequences and the assertion that the settlement is unfair as between minority Class B stockholders and Alleghany as the majority Class B stockholder. Most of the Class B objectors asserted that either the litigation should be settled on better terms than those proposed or the settlement should be rejected. The objecting Class A stockholders raised a question as to MRC's ability to finance its tender offer and a possible effect of the cash pay-out on the Company's financial structure. The sole objecting debentureholder raised the question of his continued protection upon consummation of the Plan.

In approving the Plan, the Court considered and rejected each of these objections. The nature of these objections and the reasons for the Court's rejection of these objections are set forth at pages D-10 to D-1[illegible] of the opinion of the Court annexed hereto as Attachment D.

The Company believes that, because of its unusual capital structure, it is not feasible to calculate meaningful earnings per Class B share. Certain holders of Class B Stock, however, claim that all earnings, after deducting from net income the dividends on the Class A Stock, are attributable to the Class B Stock and that such remainder of net income divided by the number of outstanding shares of Class B Stock represents the earnings per Class B share. On such basis the per share amounts attributable to the Class B Stock for the last three years would have been:

	Consolidated			
	1970	1971		1972
		Before Extraordinary Items	After Extraordinary Items	
Generally Accepted Accounting Principles	$ 61.54	$221.26	$ 67.33	$183.99
I.C.C. Accounting Principles	315.45	413.91	220.66	447.66

The Company believes that this method of calculating earnings per Class B share is misleading for much the same reasons as led the Court in its opinion, an extract of which appears on the following page, to reject a similar approach to valuation of the Class B Stock on a capitalized earnings basis.

In considering the various submissions of the parties and certain objections, at the hearing concerning the proposed settlement, with respect to alternative methods of valuing the Class B Stock, the Court stated*:

"Almost all the parties are in accord that the new common shares can be valued at about $100 per share, so that the $850-16 share package conversion rate equals approximately $2,450 for each present Class B share. But objectors and proponents differ on the present value of the B stock, as well as the A stock. It would serve no useful purpose to analyze in detail their computations whereby they evaluate the present worth of each class. Their differing estimates derive from the methods used to value the shares.

"Most objectors evaluate the shares by their book value. Several apply the capitalization of net earnings method; in this instance, they allocate to the Class B Stock all of MoPac's annual net earnings above the annual Class A dividend requirements. Their position is that the earnings of the Class A Stock cannot exceed its maximum dividend, that is, $9,319,000 or $5 per share, and consequently the balance of each year's earnings should be allocated to the Class B Stock. By their respective methods the objectors calculate that the present worth of each share of Class B Stock ranges from somewhat over $4,000 to the unrealistic, if not astronomical, figure of $25,000. Those objectors who capitalize net earnings as allocated by them to the Class B Stock estimate, at a price-earnings ratio of 10-1, its value at $4,450 per share. At a 9-1 ratio, it would be $4,005 per share (1972 earnings).

"The proponents, in evaluating the present worth of the two classes of stock, also apply the capitalization of recent earnings method (1971-1972). However, their method of allocation of earnings differs from that of the objectors. Instead of deducting the Class A maximum annual dividend requirement from net earnings, the proponents take into account the market value of the Class A Stock which, shortly before the announcement of the settlement, was selling between $70-75 per share. They capitalize MoPac's earnings for the two years on a 9-1 basis, resulting in its capitalized value of $225,000,000 to $243,000,000. The market value of the Class A Stock is deemed its true value, and accordingly its aggregate market value is deducted from MoPac's capitalized value and the difference allocated to the Class B Stock, with the end result that the Class B Stock is valued at an average of $2,365 per share; a 10-1 capitalization rate would bring the average value somewhat higher. . . .

"First, as to book value as a method of valuation. The authorities are in agreement that book value is of little significance in appraising the value of stock; that what is of prime significance is a corporation's earning potential based on past experience. The contention made by the objectors as to the change in equity between the two classes of stock is related to the book value concept. . . .

"Next, as to the capitalization of earnings method, it has been already noted that the difference in valuation between objectors and proponents of the Class A and Class B Stock results from different methods of allocating earnings to the two. Since the matter is one of judgment, there is room for disagreement. The Court has examined the submissions of the parties on this subject and is persuaded that the method of valuation, which takes into account the market value of the Class A shares and the underlying factors in its support offered by an expert retained to give an independent evaluation, is of substance and merits consideration. The expert, after taking into account the market value of the Class A Stock, valued the Class B Stock at $2,365 per share.

"The Class A Stock is listed on the New York Stock Exchange, is traded in a broad market, and almost 700,000 shares are held by the public. With an active market for the Class A Stock, it cannot be said that to ascribe the market price as its fair value is unreasonable. The market evaluation of a stock may reflect a more realistic appraisal of its value than a conceptual evaluation. Theory must yield to the reality of the market place, 'the true appraiser.' Indeed, to quote Judge Learned Hand again: 'When all is said, the value is nothing more than what people will pay for. . . .'

* The full text of the opinion is contained in Attachment D.

"The Class B Stock is traded on the over-the-counter market; the market is thin; and the traders are few. The market for the Class B Stock has never approached the values urged by the objectors. The range has been between $1,100 and $2,500 per share. The conclusion is warranted that the public market, in pragmatic terms, has taken into account MoPac's unusual capitalized structure, whereby a so-called preference stock has voting rights that control not only MoPac's management, but also its dividend policy with the power to withhold dividends from the Class B Stock, and accordingly appraised the value of the two classes of stock based upon their respective power, rights and restrictions.

"Another factor suggests that the proponents' experts' valuations are closer to the mark than the objectors' valuations. Alleghany, as the majority owner of the Class B Stock, has, through the years, been the principal antagonist to Mississippi, the majority owner of the Class A Stock. Widely divergent views as to the B stock's value have, up to the present, foreclosed any compromise. Alleghany's acceptance of the settlement as a disposition of their longstanding controversy during which it has spent millions to protect its investment may be said to reflect a realistic recognition of the true value of the Class B shares. If the objectors' evaluation of $4,000 or more per share is sound, then Alleghany, owning in excess of 21,000 shares, has, after many years of litigation, suddenly given up the ghost and yielded more than $40,000,000—hardly a likelihood in view of the history of events and the sophistication of its financial executives and advisers.

"Also, it is not without significance that objector Garfield's securities expert, who on the capitalization of earnings method fixes a value of 'over $4,000' a share for the Class B Stock, nonetheless concludes 'that if the impasse between the Class A and the Class B is to be settled, there must be a compromise at a lower figure to reflect the lack of voting control of the Class B'—another way of saying that any evaluation of the stock must make allowance for its encumbered status. Obviously that compromise figure cannot be a matter of mathematical precision; it need not be; it is a matter of judgment based upon a consideration of factors pro and con, some of which have been adverted to above. This Court is satisfied that the package of $850-16 shares common stock in exchange for each Class B share cannot be said to be inadequate, especially so when considered as a compromise." Footnotes omitted.

PRO FORMA CAPITALIZATION

The following tables set forth (a) the capitalization of the Company both on corporate (parent company only) and consolidated bases as of December 31, 1972, (b) adjustments to such capitalization to reflect consummation of the Plan (including an assumed borrowing of the entire $30,000,000 under a bank loan agreement entered into to finance the cash payment to Class B stockholders) and (c) the pro forma capitalization of the Company, both on corporate and consolidated bases, after giving effect to the consummation of the Plan. The first table is prepared in conformity with generally accepted accounting principles and the second table is prepared in conformity with Interstate Commerce Commission accounting principles. See "Principles of Financial Statement Preparation and Consolidation" under Note 1 of Notes to the Financial Statements.

Generally Accepted Accounting Principles

(In Thousands of Dollars)
(In Conformity with Generally Accepted Accounting Principles)

	Corporate			Consolidated		
	As Stated	Pro Forma Adjustments	Pro Forma	As Stated	Pro Forma Adjustments	Pro Forma
Long-Term Debt—Due in one year	$ 13,471	$ 6,000 (A)	$ 19,471	$ 28,599	$ 6,000 (A)	$ 34,599
Long-Term Debt	563,693	24,000 (A)	587,693	713,630	24,000 (A)	737,630
Stockholders' Equity:						
Old Capitalization—						
Class A—No Par, $100 Stated Value—1,864,352 shares outstanding	186,435	(186,435) (B)		186,435	(186,435) (B)	
Class B—No Par, $100 Stated Value—39,731 shares outstanding	3,973	(3,973) (B)		3,973	(3,973) (B)	
New Capitalization—						
Convertible Preferred—No Par, $100 Stated Value—1,864,352 shares outstanding		186,435 (B)	186,435		186,435 (B)	186,435
Common—No Par, $6.25 Stated Value—635,696 shares outstanding		3,973 (B)	3,973		3,973 (B)	3,973
Capital Surplus	1,505		1,505	1,505		1,505
Retained Income	117,239	(33,771) (C)	83,468	217,066	(33,771) (C)	183,295
	309,152	(33,771)	275,381	408,979	(33,771)	375,208
	$886,316	$ (3,771)	$882,545	$1,151,208	$ (3,771)	$1,147,437

NOTES:

(A) Five year bank loan repayable semi-annually.

(B) Giving effect to recapitalization.

(C) $850 in cash per share of Class B Stock.

I.C.C. Accounting Principles

(In Thousands of Dollars)
(In Conformity with I.C.C. Accounting Principles)

	Corporate			Consolidated		
	As Stated	Pro Forma Adjustments	Pro Forma	As Stated	Pro Forma Adjustments	Pro Forma
Long-Term Debt—Due in one year	$ 13,471	$ 6,000 (A)	$ 19,471	$ 28,599	$ 6,000 (A)	$ 34,599
Long-Term Debt	563,693	24,000 (A)	587,693	713,630	24,000 (A)	737,630
Stockholders' Equity:						
Old Capitalization—						
Class A—No Par, $100 Stated Value—1,864,352 shares outstanding	186,435	(186,435) (B)		186,435	(186,435) (B)	
Class B—No Par, $100 Stated Value—39,731 shares outstanding	3,973	(3,973) (B)		3,973	(3,973) (B)	
New Capitalization—						
Convertible Preferred—No Par, $100 Stated Value—1,864,352 shares outstanding		186,435 (B)	186,435		186,435 (B)	186,435
Common—No Par, $6.25 Stated Value—635,696 shares outstanding		3,973 (B)	3,973		3,973 (B)	3,973
Capital Surplus	1,505		1,505	1,505		1,505
Retained Income	199,439	(33,771) (C)	165,668	349,192	(33,771) (C)	315,421
	391,352	(33,771)	357,581	541,105	(33,771)	507,334
	$968,516	$ (3,771)	$964,745	$1,283,334	$ (3,771)	$1,279,563

Notes:
(A) Five year bank loan repayable semi-annually.
(B) Giving effect to recapitalization.
(C) $850 in cash per share of Class B Stock.

PRO FORMA FULLY DILUTED EARNINGS PER SHARE OF COMMON STOCK

Assuming that (1) the proposed recapitalization had been effected on January 1, 1970, (2) to finance the payment of $850 per share to the holders of Class B Stock, the Company had borrowed on that date $30,000,000 which remained outstanding and bore interest at 7% per annum throughout the period 1970-1972, and (3) all shares of Preferred Stock to be issued pursuant to the Plan had been converted on that date into Common Stock, the Company's consolidated earnings per share of Common Stock on a pro forma fully diluted basis for the last three years would have been:

	Consolidated			
	1970	1971		1972
		Before Extraordinary Items	After Extraordinary Items	
Generally Accepted Accounting Principles	$4.06	$6.60	$4.16	$6.01
I.C.C. Accounting Principles	8.10	9.66	6.59	10.19

The above earnings per share figures are not comparable with the amounts per Class B share set forth under "Certain Objections to Proposed Recapitalization," because the above figures reflect the after-tax cost of interest, each share of Class B Stock would be converted into 16 shares of Common Stock and no effect is given to the receipt by, and use of, $850 per share by the holders of the Class B Stock at the time of the recapitalization.

MARKET PRICES OF CLASS A AND CLASS B STOCK

The following table shows, for the periods indicated, the high and low sales prices of the Class A Stock on the New York Stock Exchange (NYSE) and the high and low bid prices of the Class B Stock in the over-the-counter (OTC) market, in each case as reported by National Quotation Bureau, Inc. Bid prices in the over-the-counter market represent prices between dealers, do not include retail markups, markdowns or commissions and do not represent actual transactions.

Period	Class A Stock NYSE Sales Prices		Class B Stock OTC Bid Prices	
	High	Low	High	Low
1970				
First Quarter	68	63¼	1220	980
Second Quarter	67¼	45½	980	700
Third Quarter	56	46½	950	650
Fourth Quarter	61¾	55¾	840	740
1971				
First Quarter	70	62	1440	760
Second Quarter	75⅞	65½	1675	1000
Third Quarter	77⅞	65½	1600	1000
Fourth Quarter	74½	69½	1325	1075
1972				
First Quarter	74⅝	70½	1275	1125
Second Quarter	74	69¼	1150	1050
Third Quarter	71½	68⅞	1125	1050
Fourth Quarter (through October 13)*	75¼	70	1625	1125
Fourth Quarter (from October 16)*	84	75⅜	2000	1700
1973				
First Quarter	83	75⅞	1860	1700
Second Quarter (through May 1)	78⅞	76⅝	1880	1850

* The terms of the proposed recapitalization were announced to the public on October 16, 1972.

On May 1, 1973, the reported last sale price of the Class A Stock on the New York Stock Exchange was 78⅜ and the reported high bid price of the Class B Stock in the over-the-counter market was 1880.

While reliable statistics as to the volume of trading in the Class B Stock are not available, the Company believes that actual trading in the Class B Stock is relatively inactive.

With respect to listing of the Preferred Stock on the New York Stock Exchange, see "Description of Preferred Stock—Listing" at page 9.

CERTAIN RESTRICTIONS IMPOSED UNTIL SURRENDER OF CERTIFICATES

Except as otherwise required by law, no holder of Class A Stock whose stock has been converted into Preferred Stock will be entitled to receive dividends or other distributions on shares of Preferred Stock, and no holder of Class B Stock whose stock has been converted into Common Stock will be entitled to receive dividends or other distributions on shares of Common Stock, until his certificate for such Class A or Class B Stock, as the case may be, is surrendered. Upon such surrender, all such dividends or other distributions will be paid, without interest.

OTHER INFORMATION

The solicitation of proxies is by the management of the Company and the Company will bear the cost of the solicitation of proxies, which will be principally by mail. Proxies may also be solicited by directors, officers and employees of the Company personally, by telephone or by telegraph. In addition, D. F. King & Co. of New York, New York, has been retained to assist in the solicitation of proxies for the Special Meeting, by the means described above, at an estimated cost (excluding expenses) to the Company of approximately $8,500.

At the time this Proxy Statement was prepared in definitive form, the management was not aware that any matters not referred to in the form of proxy would be presented for action at the Special Meeting. If any other matters properly come before the meeting, it is intended that the shares represented by proxy will be voted with respect thereto in accordance with the judgment of the persons voting them.

IMPORTANT

The interest and cooperation of all stockholders in the matters to be considered at the proposed Special Meeting are considered to be of the greatest importance by the management of the Company. Even though you expect to attend the Special Meeting, it is urgently requested that, whether your stockholdings are large or small, you promptly fill in, sign and return the enclosed form of proxy in the envelope provided herewith. No postage is necessary if mailed in the United States. To be assured that your shares will be voted, it is important that the proxy be dated and signed exactly as your name appears imprinted thereon.

MISSOURI PACIFIC RAILROAD COMPANY

AND

MISSOURI PACIFIC RAILROAD COMPANY AND SUBSIDIARIES

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REPORT OF INDEPENDENT ACCOUNTANTS

To the Stockholders and Board of Directors of
MISSOURI PACIFIC RAILROAD COMPANY

We have examined the financial statements listed in the accompanying index. Our examinations were made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

Because of the characteristics of the Company's two classes of stock, earnings per share data have been omitted from the accompanying financial statements (see Notes 9 and 11 to the financial statements).

The accompanying financial statements prepared in conformity with Interstate Commerce Commission accounting principles do not include provisions for deferred federal income taxes as required by generally accepted accounting principles and as included in the accompanying financial statements prepared in conformity therewith.

In our opinion, except for the omission of earnings per share data as described in the second paragraph, the accompanying financial statements prepared in conformity with generally accepted accounting principles present fairly (1) the consolidated financial position of the Missouri Pacific Railroad Company and its subsidiaries at December 31, 1972 and the results of their operations and the changes in their financial position for the three years then ended and (2) the financial position of the Missouri Pacific Railroad Company, parent company, at December 31, 1972 and the results of its operations and the changes in its financial position for the three years then ended, all in conformity with generally accepted accounting principles consistently applied after restatement of the consolidated financial statements for the change, with which we concur, to the equity method of accounting for investments in certain affiliated companies (see Note 2 to the financial statements).

Also, in our opinion, except for the omissions of earnings per share data and deferred federal income taxes as described in the second and third paragraphs, the accompanying financial statements prepared in conformity with Interstate Commerce Commission accounting principles present fairly (1) the consolidated financial position of the Missouri Pacific Railroad Company and its subsidiaries at December 31, 1972 and the results of their operations and the changes in their financial position for the three years then ended and (2) the financial position of the Missouri Pacific Railroad Company, parent company, at December 31, 1972 and the results of its operations and the changes in its financial position for the three years then ended, all in conformity with generally accepted accounting principles consistently applied after restatement of the consolidated financial statements for the change, with which we concur, to the equity method of accounting for investments in certain affiliated companies (see Note 2 to the financial statements).

PRICE WATERHOUSE & Co.

St. Louis, Missouri
February 16, 1973 except as to Note 11,
which is as of March 19, 1973

MISSOURI PACIFIC RAILROAD COMPANY

AND

MISSOURI PACIFIC RAILROAD COMPANY AND SUBSIDIARIES

BALANCE SHEET

(In Conformity with Generally Accepted Accounting Principles)

ASSETS

	December 31, 1972	
	Corporate	Consolidated
	(In thousands of dollars)	
Current assets:		
Cash	$ 9,657	$ 22,985
Temporary cash investments, at cost which approximates market	18,500	32,042
Deposits for acquisition of equipment	5,718	5,718
Deposits for interest and dividends	9,533	10,733
Accounts receivable, less allowance for freight billing adjustments of $930,000 and $1,290,000, respectively	37,444	51,759
Materials and supplies, at average cost	13,899	18,235
Accumulated deferred federal income tax benefits (Note 1)	7,500	11,100
Other current assets	421	1,574
	102,672	154,146
Properties: (Notes 1 and 7)		
Road	667,687	884,101
Equipment	468,993	873,179
Miscellaneous	18,007	36,046
	1,154,687	1,793,326
Less:		
Accumulated depreciation		
Road	90,081	122,598
Equipment	186,133	329,997
Miscellaneous	5,813	12,849
Excess of net assets (at acquisition) of consolidated subsidiaries over carrying value of investments		49,365
	872,660	1,278,517
Other assets and deferred charges:		
Investment in Santa Fe Industries, Inc. 6¼% convertible subordinated debentures, at cost which approximates market	9,098	9,098
Investment in terminal and other companies (Notes 2 and 3)	92,413	39,671
Capital, insurance and other funds (Note 8)	10,125	10,747
Other	5,721	8,422
	117,357	67,938
	$1,092,689	$1,500,601

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY
AND
MISSOURI PACIFIC RAILROAD COMPANY AND SUBSIDIARIES

BALANCE SHEET
(In Conformity with Generally Accepted Accounting Principles)

LIABILITIES

	December 31, 1972	
	Corporate	Consolidated
	(In thousands of dollars)	
Current liabilities:		
Accounts payable	$ 37,562	$ 45,537
Accrued wages and vacation pay	17,593	28,469
Current maturities of equipment obligations	13,471	28,599
Equipment acquisitions payable	7,149	9,851
Interest and dividends payable	7,287	8,148
Unmatured interest accrued	11,792	13,625
Federal income taxes accrued (Note 1)	886	1,774
Other taxes accrued	6,919	9,721
Other current liabilities	5,199	8,051
	107,858	153,775
Long term debt (Note 7)	563,693	713,630
Other liabilities and deferred credits:		
Accumulated deferred federal income taxes (Note 1)	93,200	166,600
Casualty and other reserves (Note 8)	11,695	16,256
Other	7,091	9,456
	111,986	192,312
Equity of minority stockholders in consolidated subsidiaries		31,905
Stockholders' equity: (Notes 9 and 11)		
Capital stock—no par value		
Class A—Authorized 3,000,000 shares; outstanding 1,864,352 shares (excluding 17,600 shares held by Company)	186,435	186,435
Class B—Authorized 1,000,000 shares; outstanding 39,731 shares	3,973	3,973
Capital surplus (Pages 27 and 30)	1,505	1,505
Retained income (Pages 27 and 30)	117,239	217,066
	309,152	408,979
Commitments and contingent liabilities (Note 10)	$1,092,689	$1,500,601

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY AND SUBSIDIARIES

STATEMENT OF CONSOLIDATED INCOME

(In Conformity with Generally Accepted Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Operating revenues:			
Freight	$504,506	$574,827	$618,275
Passenger, mail and express	9,054	5,736	2,834
Switching and other	20,568	22,057	21,810
Total operating revenues	534,128	602,620	642,919
Operating expenses: (Notes 1, 6 and 12)			
Maintenance of way and structures	76,177	88,845	99,024
Maintenance of equipment	97,745	110,355	119,302
Traffic	14,350	15,168	16,430
Transportation	203,992	227,221	246,117
General and miscellaneous	24,542	26,220	27,411
Total operating expenses	416,806	467,809	508,284
Net revenue from operations	117,322	134,811	134,635
Other operating charges: (Note 12)			
Taxes (except federal income taxes)	38,108	38,868	42,712
Equipment and joint facility rents	29,309	35,399	28,025
Total other operating charges	67,417	74,267	70,737
Net operating income (before federal income taxes)	49,905	60,544	63,898
Other income (net)	8,977	5,792	5,679
Income available for fixed charges (before federal income taxes)	58,882	66,336	69,577
Interest:			
Fixed	25,009	25,139	26,830
Contingent	10,526	10,337	10,277
Total interest	35,535	35,476	37,107
Income before federal income taxes, minority interests and extraordinary items	23,347	30,860	32,470
Provision for federal income taxes: (Notes 1 and 4)			
Current	553	3,338	3,201
Deferred	10,525	8,227	10,906
Total federal income taxes	11,078	11,565	14,107
Income before minority interests and extraordinary items	12,269	19,295	18,363
Less—income applicable to minority interests	507	1,185	1,733
Net income before extraordinary items	11,762	18,110	16,630
Extraordinary items, net of federal income taxes and portion applicable to minority interests (Note 5)		(6,116)	
Net income (including extraordinary items) (Note 2)	$ 11,762	$ 11,994	$ 16,630

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY AND SUBSIDIARIES

STATEMENT OF CONSOLIDATED RETAINED INCOME

(In Conformity with Generally Accepted Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Balance at beginning of year:			
As previously reported	$200,550	$202,545	$204,668
Restatement due to change to equity method of accounting for certain affiliated companies (Note 2)	4,683	4,934	5,287
As restated	205,233	207,479	209,955
Add—Net Income	11,762	11,994	16,630
	216,995	219,473	226,585
Deduct—Cash Dividends—			
Class A Stock—$5.00 per share	9,317	9,319	9,320
Class B Stock—$5.00 per share	199	199	199
Balance at end of year (Notes 9 and 11)	$207,479	$209,955	$217,066

MISSOURI PACIFIC RAILROAD COMPANY AND SUBSIDIARIES

STATEMENT OF CONSOLIDATED CAPITAL SURPLUS

(In Conformity with Generally Accepted Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Balance at beginning of year	$ 1,548	$ 1,537	$ 1,517
Excess of stated value of 200, 500 and 300 shares of Class A Stock issued during the years 1970, 1971 and 1972, respectively, over the option price of stock options exercised	(11)	(20)	(12)
Balance at end of year	$ 1,537	$ 1,517	$ 1,505

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY AND SUBSIDIARIES

STATEMENT OF CHANGES IN CONSOLIDATED FINANCIAL POSITION

(In Conformity with Generally Accepted Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Financial resources were provided by:			
Net income before extraordinary items	$11,762	$ 18,110	$ 16,630
Add—Charges (credits) against income not requiring working capital—			
Depreciation and retirements	37,958	40,219	41,818
Deferred federal income taxes	9,125	10,027	13,806
Income applicable to minority interests	507	1,185	1,733
Increase in long term casualty and other reserves	376	1,583	2,831
Loss on sale of investments in securities of Santa Fe Industries, Inc.		2,073	
Gain on reacquisition of long term debt	(937)		(1,206)
Other	7	(357)	1,070
Working capital provided from operations	58,798	72,840	76,682
Salvage from property sold or retired	7,393	5,050	6,532
Proceeds from sale of investments in securities of Santa Fe Industries, Inc.		8,252	5,420
Capital fund deposit decrease	3,162		
Proceeds from equipment obligations issued	17,429	33,498	57,065
Proceeds from sale of Chicago & Eastern Illinois common stock to minority interests	1,569		
	88,351	119,640	145,699
Financial resources were used for:			
Working capital used for extraordinary items—			
Entry fee in connection with discontinuance of rail passenger operations, net of income taxes		1,252	
Reacquisition of bonds		6,317	
Property additions	55,740	71,092	100,279
Reduction of long term equipment obligations	25,236	27,013	30,409
Repayment of long term debt (other than 1971 extraordinary items)	2,291	218	1,924
Dividends (including amounts paid minority interests)	10,257	9,818	9,641
Purchase of securities	96	1,610	2,171
Insurance deposit increase			5,191
Capital fund deposit increase			4,032
Other, net	453	(482)	2,998
	94,073	116,838	156,645
Increase (decrease) in working capital	$(5,722)	$ 2,802	$(10,946)
Analysis of changes in working capital:			
Cash and temporary cash investments	$11,723	$ 13,195	$(10,942)
Deposits for acquisition of equipment			5,713
Accounts receivable	(5,801)	(868)	668
Material and supplies	(962)	1,597	2,931
Accumulated deferred federal income tax benefits	(800)	2,700	1,300
Other current assets	(2,871)	(663)	2,470
Accounts payable	(6,826)	(5,700)	4,790
Accrued wages and vacation pay	(1,823)	(3,154)	(4,169)
Current maturities of equipment obligations	(240)	(1,627)	(2,400)
Equipment acquisitions payable			(9,851)
Federal income taxes accrued	(301)	(3,258)	2,187
Other current liabilities	2,179	580	(3,648)
Increase (decrease) in working capital	$(5,722)	$ 2,802	$(10,946)

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CORPORATE INCOME

(In Conformity with Generally Accepted Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Operating revenues:			
Freight	$350,207	$403,528	$434,617
Passenger, mail and express	5,502	2,919	1,378
Switching and other	13,719	15,408	15,086
Total operating revenues	369,428	421,855	451,081
Operating expenses: (Notes 1, 6 and 12)			
Maintenance of way and structures	53,805	63,021	71,671
Maintenance of equipment	60,153	70,582	77,624
Traffic	8,806	9,480	10,281
Transportation	133,165	149,676	164,708
General and miscellaneous	17,428	18,617	19,513
Total operating expenses	273,357	311,376	343,797
Net revenue from operations	96,071	110,479	107,284
Other operating charges: (Note 12)			
Taxes (except federal income taxes)	26,171	26,608	29,434
Equipment and joint facility rents	39,333	44,917	39,449
Total other operating charges	65,504	71,525	68,883
Net operating income (before federal income taxes)	30,567	38,954	38,401
Other income (net):			
Intercompany dividends (eliminated in consolidation—Note 3)	8,673	3,209	4,225
Other, net	5,162	1,701	2,569
Total other income	13,835	4,910	6,794
Income available for fixed charges (before federal income taxes)	44,402	43,864	45,195
Interest:			
Fixed	16,588	16,959	18,499
Contingent	10,440	10,251	10,190
Total interest	27,028	27,210	28,689
Income before federal income taxes and extraordinary items	17,374	16,654	16,506
Provision for federal income taxes: (Notes 1 and 4)			
Current	(815)	320	(280)
Deferred	5,812	3,462	5,850
Total federal income taxes	4,997	3,782	5,570
Net income before extraordinary items	12,377	12,872	10,936
Extraordinary items, less federal income taxes (Note 5)		(4,989)	
Net income (including extraordinary items) (Note 3)	$ 12,377	$ 7,883	$ 10,936

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CORPORATE RETAINED INCOME

(In Conformity with Generally Accepted Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Balance at beginning of year	$114,596	$117,457	$115,822
Add—Net Income	12,377	7,883	10,936
	126,973	125,340	126,758
Deduct—Cash Dividends—			
Class A Stock—$5.00 per share	9,317	9,319	9,320
Class B Stock—$5.00 per share	199	199	199
Balance at end of year (Notes 9 and 11)	$117,457	$115,822	$117,239

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CORPORATE CAPITAL SURPLUS

(In Conformity with Generally Accepted Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Balance at beginning of year	$1,548	$1,537	$1,517
Excess of stated value of 200, 500 and 300 shares of Class A Stock issued during the years 1970, 1971 and 1972, respectively, over the option price of stock options exercised	(11)	(20)	(12)
Balance at end of year	$1,537	$1,517	$1,505

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CHANGES IN CORPORATE FINANCIAL POSITION

(In Conformity with Generally Accepted Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Financial resources were provided by:			
Net income before extraordinary items	$12,377	$12,872	$ 10,936
Add—Charges (credits) against income not requiring working capital—			
Depreciation and retirements	21,856	22,944	24,376
Deferred federal income taxes	4,912	4,462	7,950
Increase (decrease) in long term casualty and other reserves	(127)	2,393	2,124
Loss on sale of investments in securities of Santa Fe Industries, Inc.		2,073	
Gain on reacquisition of long term debt	(534)		(1,072)
Other	156	280	241
Working capital provided from operations	38,640	45,024	44,555
Salvage from property sold or retired	3,449	2,156	2,982
Proceeds from sale of investments in securities of Santa Fe Industries, Inc.		8,252	5,420
Capital fund deposit decrease	3,162		
Proceeds from equipment obligations issued	13,529	18,560	33,000
	58,780	73,992	85,957
Financial resources were used for:			
Working capital used for extraordinary items—			
Entry fee in connection with discontinuance of rail passenger operations, net of income taxes		1,252	
Reacquisition of bonds		3,552	
Property additions	35,792	37,731	55,092
Reduction of long term equipment obligations	12,239	13,415	14,312
Repayment of long term debt (other than 1971 extraordinary items)	363		1,367
Dividends	9,516	9,518	9,519
Purchase of securities	3,586	1,610	2,171
Insurance deposit increase			5,191
Capital fund deposit increase			4,032
Other, net	366	250	3,169
	61,862	67,328	94,853
Increase (decrease) in working capital	$(3,082)	$ 6,664	$ (8,896)
Analysis of changes in working capital:			
Cash and temporary cash investments	$13,667	$15,043	$(11,491)
Deposits for acquisition of equipment			5,718
Accounts receivable	(6,544)	(668)	399
Material and supplies	(439)	1,516	2,158
Accumulated deferred federal income tax benefits	(700)	1,900	1,100
Other current assets	(2,151)	(597)	2,191
Accounts payable	(6,672)	(3,185)	959
Accrued wages and vacation pay	(1,249)	(2,406)	(2,704)
Current maturities of equipment obligations	(182)	(845)	(496)
Equipment acquisitions payable			(7,147)
Federal income taxes accrued	(153)	(3,871)	2,886
Other current liabilities	1,341	(223)	(2,469)
Increase (decrease) in working capital	$(3,082)	$ 6,664	$ (8,896)

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY

AND

MISSOURI PACIFIC RAILROAD COMPANY AND SUBSIDIARIES

BALANCE SHEET

(In Conformity with I.C.C. Accounting Principles)

ASSETS

	December 31, 1972	
	Corporate	Consolidated
	(In thousands of dollars)	
Current assets:		
Cash	$ 9,657	$ 22,985
Temporary cash investments, at cost (approximates market)	18,500	32,042
Deposits for interest, dividends and equipment acquisition	15,251	16,451
Accounts receivable	37,444	51,759
Material and supplies, at average cost	13,899	18,235
Other current assets	421	1,574
	95,172	143,046
Properties: (Notes 1 and 7)		
Road	667,687	884,101
Equipment	468,993	873,179
Miscellaneous	18,007	36,046
	1,154,687	1,793,326
Less:		
Accumulated depreciation		
Road	90,081	122,598
Equipment	186,133	329,997
Miscellaneous	5,813	12,849
Excess of net assets (at acquisition) of consolidated subsidiaries over carrying value of investments		59,627
	872,660	1,268,255
Other assets and deferred charges:		
Investment in Santa Fe Industries, Inc. 6¼% convertible subordinated debentures, at cost (approximates market)	9,098	9,098
Investment in terminal and other companies (Notes 2 and 3)	92,413	40,117
Capital, insurance and other funds (Note 8)	10,125	10,747
Other	5,721	8,422
	117,357	68,384
	$1,085,189	$1,479,685

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY

AND

MISSOURI PACIFIC RAILROAD COMPANY AND SUBSIDIARIES

BALANCE SHEET

(In Conformity with I.C.C. Accounting Principles)

LIABILITIES

	December 31, 1972	
	Corporate	Consolidated
	(In thousands of dollars)	
Current liabilities: (exclusive of long term debt due within one year)		
Accounts and wages payable	$ 55,155	$ 74,006
Interest and dividends payable	7,287	8,148
Unmatured interest accrued	11,792	13,625
Federal income taxes accrued (Note 1)	4,386	7,374
Other taxes accrued	6,919	9,721
Other current liabilities	12,348	17,902
	97,887	130,776
Long term debt—due within one year (equipment obligations)	13,471	28,599
Long term debt (Note 7)	563,693	713,630
Other liabilities and deferred credits (Note 8)	18,786	25,712
Equity of minority stockholders in consolidated subsidiaries		39,863
Stockholders' equity: (Notes 9 and 11)		
Capital stock—no par value		
Class A—Authorized 3,000,000 shares; outstanding 1,864,352 shares (excluding 17,600 shares held by Company)	186,435	186,435
Class B—Authorized 1,000,000 shares; outstanding 39,731 shares	3,973	3,973
Capital surplus (Pages 35 and 38)	1,505	1,505
Retained income (Pages 35 and 38)	199,439	349,192
	391,352	541,105
Commitments and contingent liabilities (Note 10)		
	$1,085,189	$1,479,685

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY AND SUBSIDIARIES

STATEMENT OF CONSOLIDATED INCOME

(In Conformity with I.C.C. Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Operating revenues:			
Freight	$504,506	$574,827	$618,275
Passenger, mail and express	9,054	5,736	2,834
Switching and other	20,568	22,057	21,810
Total operating revenues	534,128	602,620	642,919
Operating expenses: (Notes 1, 6 and 12)			
Maintenance of way and structures	76,177	88,845	99,024
Maintenance of equipment	97,745	110,355	119,302
Traffic	14,350	15,168	16,430
Transportation	203,992	227,221	246,117
General and miscellaneous	24,542	26,220	27,411
Total operating expenses	416,806	467,809	508,284
Net revenue from operations	117,322	134,811	134,635
Other operating charges: (Note 12)			
Taxes (except federal income taxes)	38,108	38,868	42,712
Equipment and joint facility rents	29,309	35,399	28,025
Total other operating charges	67,417	74,267	70,737
Net operating income (before federal income taxes)	49,905	60,544	63,898
Other income (net)	8,977	5,792	5,679
Income available for fixed charges (before federal income taxes)	58,882	66,336	69,577
Interest:			
Fixed	25,009	25,139	26,830
Contingent	10,526	10,337	10,277
Total interest	35,535	35,476	37,107
Income before federal income taxes, minority interests and extraordinary items	23,347	30,860	32,470
Current federal income taxes (Notes 1 and 4)	553	3,338	3,201
Income before minority interests and extraordinary items	22,794	27,522	29,269
Less—income applicable to minority interests	944	1,758	2,163
Net income before extraordinary items	21,850	25,764	27,106
Extraordinary items, net of federal income taxes and portion applicable to minority interests (Note 5)		(7,678)	
Net income (including extraordinary items) (Note 2)	$ 21,850	$ 18,086	$ 27,106

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY AND SUBSIDIARIES

STATEMENT OF CONSOLIDATED RETAINED INCOME

(In Conformity with I.C.C. Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Balance at beginning of year:			
As previously reported	$306,081	$318,145	$325,965
Restatement due to change to equity method of accounting for certain affiliated companies (Note 2)	4,622	4,892	5,640
As restated	310,703	323,037	331,605
Add—Net Income	21,850	18,085	27,106
	332,553	341,123	358,711
Deduct—Cash Dividends—			
Class A Stock—$5.00 per share	9,317	9,319	9,320
Class B Stock—$5.00 per share	199	199	199
Balance at end of year (Notes 9 and 11)	$323,037	$331,605	$349,192

MISSOURI PACIFIC RAILROAD COMPANY AND SUBSIDIARIES

STATEMENT OF CONSOLIDATED CAPITAL SURPLUS

(In Conformity with I.C.C. Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Balance at beginning of year	$ 1,548	$ 1,537	$ 1,517
Excess of stated value of 200, 500 and 300 shares of Class A Stock issued during the years 1970, 1971 and 1972, respectively, over the option price of stock options exercised	(11)	(20)	(12)
Balance at end of year	$ 1,537	$ 1,517	$ 1,505

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY AND SUBSIDIARIES

STATEMENT OF CHANGES IN CONSOLIDATED FINANCIAL POSITION

(In Conformity with I.C.C. Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Financial resources were provided by:			
Net income before extraordinary items	$21,850	$ 25,764	$ 27,106
Add—Charges (credits) against income not requiring working capital—			
Depreciation and retirements	37,958	40,219	41,818
Income applicable to minority interests	944	1,758	2,163
Increase in long term casualty and other reserves	376	1,583	2,831
Loss on sale of investments in securities of Santa Fe Industries, Inc.		2,073	
Gain on reacquisition of long term debt	(937)		(1,206)
Other	7	(357)	1,070
Working capital provided from operations	60,198	71,040	73,782
Salvage from property sold or retired	7,393	5,050	6,532
Proceeds from sale of investments in securities of Santa Fe Industries, Inc.		8,252	5,420
Capital fund deposit decrease	3,162		
Proceeds from equipment obligations issued	17,429	33,498	57,065
Proceeds from sale of Chicago & Eastern Illinois common stock to minority interests	1,569		
	89,751	117,840	142,799
Financial resources were used for:			
Working capital used for extraordinary items—			
Entry fee in connection with discontinuance of rail passenger operations, net of income taxes		1,252	
Reacquisition of bonds		6,317	
Property additions	55,740	71,092	100,279
Repayment of equipment obligations	24,996	25,386	28,009
Repayment of long term debt (other than 1971 extraordinary items)	2,291	218	1,924
Dividends (including amounts paid minority interests)	10,257	9,818	9,641
Purchase of securities	96	1,610	2,171
Insurance deposit increase			5,191
Capital fund deposit increase			4,032
Other, net	453	(482)	2,998
	93,833	115,211	154,245
Increase (decrease) in working capital (exclusive of changes in long term debt due within one year)	$(4,082)	$ 2,629	$(11,446)
Analysis of changes in working capital:			
Cash and temporary cash investments	$11,723	$ 13,195	$(10,942)
Accounts receivable	(5,801)	(868)	668
Material and supplies	(962)	1,597	2,931
Other current assets	(2,871)	(663)	8,188
Accounts and wages payable	(8,649)	(8,854)	621
Federal income taxes accrued	299	(2,358)	587
Other current liabilities	2,179	580	(13,499)
Increase (decrease) in working capital (exclusive of changes in long term debt due within one year)	$(4,082)	$ 2,629	$(11,446)

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CORPORATE INCOME

(In Conformity with I.C.C. Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Operating revenues:			
Freight	$350,207	$403,528	$434,617
Passenger, mail and express	5,502	2,919	1,378
Switching and other	13,719	15,408	15,086
Total operating revenues	369,428	421,855	451,081
Operating expenses: (Notes 1, 6 and 12)			
Maintenance of way and structures	53,805	63,021	71,671
Maintenance of equipment	60,153	70,582	77,624
Traffic	8,806	9,480	10,281
Transportation	133,165	149,676	164,708
General and miscellaneous	17,428	18,617	19,513
Total operating expenses	273,357	311,376	343,797
Net revenue from operations	96,071	110,479	107,284
Other operating charges: (Note 12)			
Taxes (except federal income taxes)	26,171	26,608	29,434
Equipment and joint facility rents	39,333	44,917	39,449
Total other operating charges	65,504	71,525	68,883
Net operating income (before federal income taxes)	30,567	38,954	38,401
Other income (net):			
Intercompany dividends (eliminated in consolidation—Note 3)	8,673	3,209	4,225
Other, net	5,162	1,701	2,569
Total other income	13,835	4,910	6,794
Income available for fixed charges (before federal income taxes)	44,402	43,864	45,195
Interest:			
Fixed	16,588	16,959	18,499
Contingent	10,440	10,251	10,190
Total interest	27,028	27,210	28,689
Income before federal income taxes and extraordinary items	17,374	16,654	16,506
Current federal income taxes (Notes 1 and 4)	(815)	320	(280)
Net income before extraordinary items	18,189	16,334	16,786
Extraordinary items, less federal income taxes (Note 5)		(6,472)	
Net income (including extraordinary items) (Note 3)	$ 18,189	$ 9,862	$ 16,786

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CORPORATE RETAINED INCOME

(In Conformity with I.C.C. Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Balance at beginning of year	$183,155	$191,828	$192,172
Add—Net Income	18,189	9,862	16,786
	201,344	201,690	208,958
Deduct—Cash Dividends—			
Class A Stock—$5.00 per share	9,317	9,319	9,320
Class B Stock—$5.00 per share	199	199	199
Balance at end of year (Notes 9 and 11)	$191,828	$192,172	$199,439

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CORPORATE CAPITAL SURPLUS

(In Conformity with I.C.C. Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Balance at beginning of year	$1,548	$1,537	$1,517
Excess of stated value of 200, 500 and 300 shares of Class A Stock issued during the years 1970, 1971 and 1972, respectively, over the option price of stock options exercised	(11)	(20)	(12)
Balance at end of year	$1,537	$1,517	$1,505

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CHANGES IN CORPORATE FINANCIAL POSITION

(In Conformity with I.C.C. Accounting Principles)

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Financial resources were provided by:			
Net income before extraordinary items	$18,189	$16,334	$ 16,786
Add—Charges (credits) against income not requiring working capital—			
Depreciation and retirements	21,856	22,944	24,376
Increase (decrease) in long term casualty and other reserves	(127)	2,393	2,124
Loss on sale of investments in securities of Santa Fe Industries, Inc.		2,073	
Gain on reacquisition of long term debt	(534)		(1,072)
Other	156	280	241
Working capital provided from operations	39,540	44,024	42,455
Salvage from property sold or retired	3,449	2,156	2,982
Proceeds from sale of investments in securities of Santa Fe Industries, Inc.		8,252	5,420
Capital fund deposit decrease	3,162		
Proceeds from equipment obligations issued	13,529	18,560	33,000
	59,680	72,992	83,857
Financial resources were used for:			
Working capital used for extraordinary items—			
Entry fee in connection with discontinuance of rail passenger operations, net of income taxes		1,252	
Reacquisition of bonds		3,552	
Property additions	35,792	37,731	55,092
Repayment of equipment obligations	12,057	12,570	13,816
Repayment of long term debt (other than 1971 extraordinary items)	363		1,367
Dividends	9,516	9,518	9,519
Purchase of securities	3,586	1,610	2,171
Insurance deposit increase			5,191
Capital fund deposit increase			4,032
Other, net	366	250	3,169
	61,680	66,483	94,357
Increase (decrease) in working capital (exclusive of changes in long term debt due within one year)	$(2,000)	$ 6,509	$(10,500)
Analysis of changes in working capital:			
Cash and temporary cash investments	$13,667	$15,043	$(11,491)
Accounts receivable	(6,544)	(668)	399
Material and supplies	(439)	1,516	2,158
Other current assets	(2,151)	(597)	7,909
Accounts and wages payable	(7,921)	(5,591)	(1,745)
Federal income taxes accrued	47	(2,971)	1,886
Other current liabilities	1,341	(223)	(9,616)
Increase (decrease) in working capital (exclusive of changes in long term debt due within one year)	$(2,000)	$ 6,509	$(10,500)

See notes to financial statements.

MISSOURI PACIFIC RAILROAD COMPANY
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MISSOURI PACIFIC RAILROAD COMPANY AND SUBSIDIARIES

NOTES TO FINANCIAL STATEMENTS

NOTE 1—Summary of Significant Accounting Policies:

Principles of Financial Statement Preparation and Consolidation—The accompanying consolidated financial statements include the accounts of the Missouri Pacific Railroad Company and its majority-owned subsidiaries, principally The Texas and Pacific Railway Company (96.5% owned) and the Chicago & Eastern Illinois Railroad Company (66.8% owned).

In order to comply with the provisions of Accounting Principles Board Opinion No. 18, which became effective in 1972, the Company changed from the cost method to the equity method of accounting in its consolidated financial statements for investments in less than majority-owned terminal railroad companies (joint ventures) and other affiliated companies where the Company has the ability to exercise significant influence over their operating and financial policies. These investments are now carried at the Company's equity in the underlying net assets of these nonsubsidiary companies.

The accompanying corporate financial statements include investments in majority-owned subsidiaries, terminal and other companies carried at cost. They also include income of these companies to the extent of dividends received.

The accompanying financial statements prepared in conformity with generally accepted accounting principles include provisions for deferred federal income taxes (see "Federal Income Taxes" below). However, the accompanying financial statements prepared in conformity with Interstate Commerce Commission accounting principles do not include such provisions. The Company and its railroad subsidiaries maintain their books of account and prepare their annual reports to stockholders using the latter principles.

Federal Income Taxes—The accompanying financial statements prepared on a generally accepted accounting basis include a provision for deferred federal income taxes representing the net effect of book/tax timing differences. These timing differences relate to the use of accelerated depreciation and amortization of properties for income tax purposes, partially offset by expense accruals for casualties and other matters which are not deductible for income tax purposes until paid.

Investment tax credit is accounted for under the flow-through method.

Properties—Properties are stated at estimated original cost, primarily determined as of January 1, 1955 by Interstate Commerce Commission valuations, plus additions and betterments at cost and less retirements since the dates of valuations.

The companies follow the straight-line method of depreciation using various group rates prescribed by the Interstate Commerce Commission. Depreciation provisions during the three years ended December 31, 1972 were at rates approximating the following:

	Corporate	Consolidated
Equipment	3.7%	3.6%
Depreciable road properties	2.2%	2.0%

However, for rails, ties and other track materials, instead of depreciation accounting, the companies follow an acceptable alternate practice of "replacement" accounting. Under this method, replacements in kind are charged to expense while additions and betterments (improvements) are capitalized. The amounts capitalized are not depreciated and are charged against income only when the related properties are retired. Normal retirements of depreciable property are charged to the appropriate depreciation reserve at cost less salvage. At December 31, 1972 corporate and consolidated nondepreciable properties, including land and land rights, were approximately $437,000,000 and $545,000,000, respectively.

Excess of net assets (at acquisition) of consolidated subsidiaries over carrying value of investments is not being amortized.

Pensions—The companies have an unfunded, noncontributory pension plan for executives, officials and certain key employees. Related charges to operating expense represent accruals which include normal cost and amortization of prior service cost over a 35 year period beginning January 1, 1966, plus interest on the recorded unfunded pension liability.

Casualty Losses—Casualty losses are accrued and charged to income as they are incurred except for major casualties covered by the self-insurance reserve described in Note 8.

Debt and Related Expense—Discount and expense applicable to long term debt are deferred and amortized over the lives of the respective issues using the bonds outstanding method. Gain on reacquisition of bonds is recorded as income.

NOTE 2—Change in Accounting:

As described in Note 1, the Company changed from the cost method to the equity method of accounting for certain investments in 1972. The accompanying consolidated financial statements for 1970 and 1971 have been restated for comparative purposes. Accordingly, consolidated retained income as of January 1, 1970 was increased, as shown below, to reflect the Company's equity in the underlying net assets of these companies at that date; and the 1970 and 1971 results were increased, as shown below, to reflect the Company's proportionate share of their 1970 and 1971 net income.

	Generally accepted accounting basis	I.C.C. accounting basis
	(In thousands of dollars)	
Increase in consolidated retained income at January 1, 1970	$4,683	$4,622
Increase in consolidated net income—		
1970	$ 251	$ 270
1971	$ 353	$ 748

NOTES TO FINANCIAL STATEMENTS—(Continued)

NOTE 3—Equity in Net Assets and Income of Affiliated Companies:

The accompanying corporate financial statements include investments in majority-owned subsidiaries, terminal and other companies carried at cost. The Company's equity in the underlying net assets of these companies exceeded its investment therein at December 31, 1972 as follows:

	Generally accepted accounting basis	I.C.C. accounting basis
	(In thousands of dollars)	
Company's equity in majority-owned subsidiaries:		
Stockholders' equity of majority-owned subsidiaries ..	$242,259	$310,086
Portion applicable to minority interests	(31,905)	(39,863)
Excess of net assets (at acquisition) of these subsidiaries over carrying value of investments	(49,365)	(59,627)
	160,989	210,596
Company's equity in less than majority-owned companies	16,156	16,475
Company's equity in the underlying net assets	177,145	227,071
Company's investment, at cost	(77,318)	(77,318)
Excess of equity in net assets over investment	$ 99,827	$149,753

The accompanying corporate financial statements also include income of these companies to the extent of intercompany dividends. However, equity in the earnings of these companies for the three years ended December 31, 1972 was as follows:

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Generally accepted accounting basis	$ 8,058	$ 7,320	$ 9,919
I.C.C. accounting basis	$12,334	$11,433	$14,545

NOTE 4—Investment Tax Credit:

The investment tax credit, which has been applied under the flow-through method against the provisions for current federal income taxes, affected income as follows:

	Year ended December 31					
	Corporate			Consolidated		
	1970	1971	1972	1970	1971	1972
	(In thousands of dollars)					
Increase (decrease) in income before minority interests and extraordinary items	$(1,100)	$1,764	$(156)	$(342)	$2,145	$1,200
Less—extraordinary items		(1,069)			(1,413)	
Increase (decrease) in income before minority interests	$(1,100)	$ 695	$(156)	$(342)	$ 732	$1,200

At December 31, 1972, consolidated investment tax credit carryovers of approximately $26,700,000 are available to offset future years' federal income taxes otherwise payable. Of the $26,700,000 carryover, $1,600,000 will expire in 1974, $5,300,000 in 1975, $4,200,000 in 1976, $2,100,000 in 1977, $4,700,000 in 1978, $7,200,000 in 1979 and $1,600,000 in 1980, if not used.

NOTES TO FINANCIAL STATEMENTS—(Continued)

NOTE 5—Extraordinary Items:

Extraordinary items for the year ended December 31, 1971 consisted of the following:

	Generally accepted accounting basis		I.C.C. accounting basis	
	Corporate	Consolidated	Corporate	Consolidated
	(In thousands of dollars)			
Estimated loss on discontinuance of rail passenger operations	$10,839	$13,924	$10,839	$13,924
Gain on reacquisition of bonds	3,298	4,466	3,298	4,466
	7,541	9,458	7,541	9,458
Less federal income taxes—				
Current (Note 4)	1,069	1,413	1,069	1,413
Deferred	1,483	1,713		
	4,989	6,332	6,472	8,045
Less portion applicable to minority interests		216		367
Extraordinary items	$ 4,989	$ 6,116	$ 6,472	$ 7,678

On May 1, 1971, the Company entered into a contract with the National Railroad Passenger Corporation (AMTRAK) which relieved the Company of its entire responsibility for the provision of intercity rail passenger service. The resultant estimated loss includes the book value of properties removed from rail passenger service, liability to the National Railroad Passenger Corporation in consideration of such relief, impairments to investments in terminal companies, employee protective benefits and other related costs.

During 1971, bonds were reacquired having par value as follows:

	Corporate	Consolidated
Par value	$6,850,000	$10,783,000

NOTE 6—Retirement Plan:

Pension expense as described in Note 1 resulted in charges to operating expense as follows:

Corporate			Consolidated		
1970	1971	1972	1970	1971	1972
		(In thousands of dollars)			
$1,878	$2,067	$2,199	$2,936	$3,162	$3,332

The approximate amount by which unfunded past service cost and the approximate amount by which the actuarially computed value of benefits pertaining to retired employees exceed the recorded pension plan liability at December 31, 1972 are as follows:

	Corporate	Consolidated
Excess of the unfunded past service cost over recorded liability	$27,000,000	$40,000,000
Excess of the actuarially computed value of benefits pertaining to retired employees over recorded liability	$11,400,000	$19,200,000

NOTE 7—Long Term Debt:

The companies were obligated under evidences of indebtedness at December 31, 1972 as follows:

	Interest rate	Date of maturity	Outstanding December 31, 1972 (excluding amounts held by Company) (In thousands of dollars)
Missouri Pacific Railroad Company:			
First mortgage bonds(1)	4¼%	1990 and 2005	$247,473
General mortgage bonds(1)	4¾%(2)	2020 and 2030	109,257
Income debentures	5%(2)	2045	100,016
Equipment obligations	3⅝% to 9%	1973 to 1987	120,418
Corporate total			577,164
Texas and Pacific Railway Company:			
First mortgage bonds	5%	2000	18,961
Second mortgage bonds	5%	2000	8
General and refunding mortgage bonds(1)	3⅞%	1985	14,634
First mortgage bonds (KO&G)(1)	3⅝%	1980	2,268
Equipment obligations	4⅛% to 7¾%	1973 to 1987	67,336
Chicago & Eastern Illinois Railroad Company:			
Income debentures(1)	5%(2)	2054	1,721
Equipment obligations	5% to 6¾%	1973 to 1982	14,495
Other majority-owned subsidiaries:			
First mortgage bonds	3⅜%	1974	197
Equipment obligations	4½% to 6%	1973 to 1985	44,615
Others			830
Consolidated total			$742,229

(1) Have annual sinking fund requirements.
(2) Contingent interest.

Long term debt (in thousands) maturing during each of the next five years are as follows:

	1973	1974	1975	1976	1977
Corporate	$13,471	$12,589	$12,289	$11,698	$10,786
Consolidated	$29,222	$28,906	$28,359	$27,652	$26,275

Substantially all of the physical properties of the Missouri Pacific Railroad Company and Subsidiaries are covered by liens of either the Missouri Pacific Railroad Company or the Texas and Pacific Railway Company first mortgages or under the companies' equipment obligations. The capital stock of most Missouri Pacific Railroad Company affiliates, other than the Chicago & Eastern Illinois Railroad Company and the Alton & Southern Railway Company, is pledged under its first mortgage.

NOTE 8—Casualty Reserves:

Effective February 1, 1972, the Company and its majority-owned subsidiaries, except for the Chicago & Eastern Illinois Railroad Company and Subsidiary, increased their insurance deductible from $1,500,000 to $5,000,000 with respect to casualty losses resulting from destroyed freight cars, freight loss and damage, personal injury and third party liability. As a result, a self-insurance reserve has been established on the Company's books to account for any such loss to the extent that it exceeds $1,500,000 and is less than $5,000,000. Estimated premium savings from increasing the deductible are added to the reserve and applicable losses are charged to it. If the reserve balance totals $5,000,000 (the maximum self-insured loss expected to occur in any one year), no additional charges are to be made against income unless the reserve declines below the maximum amount. At December 31, 1972 the reserve balance was $735,000. At that date the Company had also set aside $5,200,000 in capital, insurance and other funds to be used in the event of self-insured losses.

NOTE 9—Capital Stock and Retained Income:

As of December 31, 1972, the Company had outstanding 1,904,083 shares of capital stock divided into two classes. Of this total 97.9% or 1,864,352 shares were Class A stock and 2.1% or 39,731 shares were Class B stock. These percentages are unchanged from December 31, 1970 and 1971. These shares are without par value, but each has a stated value of $100 per share. Holders of Class A and Class B stock have full voting rights equal to one vote for each share held, but the Class A and Class B shares are entitled to vote separately as a class upon certain matters, including the issuance of additional shares and modifications of present shares.

Dividends on the Class A stock are noncumulative and may not exceed $5 per share in any given calendar year. After dividends of $5 per share have been paid on the Class A stock in any year, dividends may be paid on the Class B stock in such amount as the Board of Directors may declare. Dividends on both classes of stock are subject to the setting aside of such reserves and making such other provisions as the Board may deem necessary or advisable for working capital or expansion of the business of the Company, including the acquisition of property, or for other corporate purposes. Undistributed earnings of prior years may be used to pay cash dividends in succeeding years on either class of stock.

In the event of liquidation of the Company the holders of Class A stock will be entitled to receive, out of the assets, a maximum of $100 per share before any distribution is made to the holders of the

Class B Stock. Thereafter, the holders of the Class B Stock will be entitled to receive any further distributions out of the assets of the Company without participation by the Class A holders. Neither the Class A nor Class B Stock is convertible into the other class and neither is subject to redemption.

The provisions of the mortgages and indenture relative to priority of call in each year upon "Available Net Income" (as defined therein) have been satisfied and no restriction under the mortgages and indenture on the parent company's retained income at December 31, 1972 exists.

See page 1 of this Proxy Statement for proposed recapitalization.

NOTE 10—Commitments and Contingent Liabilities:

The Company and its railroad subsidiaries lease a general office building and certain transportation equipment under long term lease agreements with rental obligations as follows:

	Corporate	Consolidated
Aggregate rental obligations as of December 31, 1972	$55,900,000	$64,000,000
Rental obligations to be paid in 1973	$ 4,400,000	$ 5,500,000

The Company and its railroad subsidiaries are contingently liable as guarantors, together with other owner railroads, for principal and interest of certain obligations of various affiliated companies at December 31, 1972 as follows:

	Corporate	Consolidated
Amount of principal guaranteed on affiliated company obligations	$69,000,000	$124,000,000

Under terms of a service interruption policy, the Company and its railroad subsidiaries are contingently liable for additional premiums, in the event of work stoppages on other participating roads, up to maximum amounts as follows:

	Corporate	Consolidated
Maximum amount of additional premiums	$11,100,000	$15,500,000

NOTE 11—Legal Proceeding:

See pages 1 and 4-6 of this Proxy Statement for details as to the proposed settlement of the Company's Class B stockholders' lawsuit. These stockholders have sued the Company and three of its directors and Mississippi River Corporation, on behalf of all the class and derivatively on behalf of the Company, asserting that dividends paid on the Class B stock are inadequate and that Mississippi River Corporation is seeking to enrich itself by depriving those stockholders of their share of the Company's earnings. The proposed settlement would involve, among other things, a recapitalization of the Company, a distribution by the Company of $33,771,000 in cash to the Class B stockholder group and a tender offer by Mississippi River Corporation whereby it will become the majority owner of each class of stock to be outstanding.

NOTES TO FINANCIAL STATEMENTS—(Continued)

NOTE 12—Supplementary Profit and Loss Information:

	Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
A summary of maintenance, depreciation and retirement charges (nondepreciable property) is presented below (see Note 1 for a description of depreciation practices):			
Corporate—			
Maintenance of way and equipment (excluding depreciation and retirement charges)	$ 92,102	$110,659	$124,919
Depreciation	$ 20,484	$ 21,164	$ 21,818
Retirement charges	$ 1,372	$ 1,780	$ 2,558
Consolidated—			
Maintenance of way and equipment (excluding depreciation and retirement charges)	$135,964	$158,981	$176,508
Depreciation	$ 36,403	$ 38,076	$ 38,770
Retirement charges	$ 1,555	$ 2,143	$ 3,048
The following amounts have also been charged to expenses:			
Corporate—			
Taxes, other than federal income taxes:			
Property and franchise	$ 10,267	$ 10,019	$ 10,016
Federal unemployment	3,053	3,052	3,105
Federal retirement	12,851	13,537	16,313
	$ 26,171	$ 26,608	$ 29,434
Rents, net:			
Hire of freight cars	$ 34,815	$ 40,271	$ 33,700
Joint facility	4,215	3,816	4,618
Other	303	830	1,131
	$ 39,333	$ 44,917	$ 39,449
Consolidated—			
Taxes, other than federal income taxes:			
Property and franchise	$ 14,623	$ 14,518	$ 14,565
Federal unemployment	4,442	4,411	4,445
Federal retirement	19,043	19,939	23,702
	$ 38,108	$ 38,868	$ 42,712
Rents, net:			
Hire of freight cars	$ 24,512	$ 31,338	$ 22,237
Joint facility	3,371	2,656	3,272
Other	1,426	1,405	2,516
	$ 29,309	$ 35,399	$ 28,025

UNAUDITED INTERIM FINANCIAL INFORMATION

The following unaudited information with respect to the three months ended March 31, 1972 and 1973 includes, in the opinion of the Company, all adjustments, consisting only of normal recurring accruals, considered to be necessary for a fair presentation of revenues and net income for such periods. The results shown for the three months ended March 31, 1973 are not necessarily indicative of the results which will be achieved for the entire year.

	Corporate		Consolidated	
	Three Months Ended March 31		Three Months Ended March 31	
	1972	1973	1972	1973
	(In thousands of dollars)			
Total operating revenues	$106,257	$122,974	$152,700	$175,748
Net income (in conformity with generally accepted accounting principles)	2,817	3,731	5,758*	6,836
Net income (in conformity with I.C.C. accounting principles)	4,549	4,839	8,491*	9,488

* Restated to include the Company's share of earnings (or losses) of unconsolidated, less than majority-owned, terminal and other affiliated companies on the basis of equity accounting.

Operating revenues and net income for the first quarter of 1973 were primarily increased due to generally accelerated economic conditions, realization of increased freight rate benefits and substantial grain movements to the Gulf Ports for export to Russia. The general economy of the country and future grain movements for the remainder of the year will govern the volume of revenue arising from shipments of raw materials and manufactured products and may not offset anticipated increased labor and material costs unless freight rate increases are approved.

COMPUTATION AND APPLICATION OF "AVAILABLE NET INCOME"

Missouri Pacific Railroad Company and Its Wholly-Owned Railway Companies

(As required by the Company's Mortgages and Indenture)

(In conformity with I.C.C. Accounting Principles)

	(Unaudited) Year ended December 31		
	1970	1971	1972
	(In thousands of dollars)		
Corporate Income Before Fixed Charges and After Federal Income Taxes	$45,217	$37,072	$45,476
Income (Loss) of Wholly-Owned Railway Companies	115	115	(67)
Road Property Retired and Charged to Operating Expenses	1,306	1,895	2,561
	46,638	39,082	47,970
Less—Dividends of Wholly-Owned Railway Companies Included in Missouri Pacific Income	200	—	—
Total Income Available for Fixed Charges	46,438	39,082	47,970
Fixed Charges	16,588	16,959	18,499
Available Net Income	29,850	22,123	29,471
Capital Expenditures Fund	4,548	5,946	7,243
Remaining Income	25,302	16,177	22,228
First Mortgage Sinking Fund	771	771	771
Remaining Income	24,531	15,406	21,457
Interest on General Mortgage Bonds, Series A	2,794	2,712	2,692
Remaining Income	21,737	12,694	18,765
Sinking Fund on General Mortgage Bonds, Series A	350	350	350
Remaining Income	21,387	12,344	18,415
Interest on General Mortgage Bonds, Series B	2,645	2,538	2,497
Remaining Income	18,742	9,806	15,918
Sinking Fund on General Mortgage Bonds, Series B	338	338	338
Remaining Income	18,404	9,468	15,580
Interest on Income Debentures	5,001	5,001	5,001
Balance	$13,403	$ 4,467	$10,579

74-2104

3899-32

#8

B 62

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of August, one thousand nine hundred and seventy-four.

Betty Levin, on behalf of herself and all other holders of the Class B Common Stock of Missouri Pacific Railroad Company, Alleghany Corporation and Robert Levasseur,

Plaintiff-Appellee

v.

Mississippi River Corporation, Missouri Pacific Railroad Company, Robert H. Craft, Toc Davis and Thomas F. Milbank,

Defendants

Michael Moumousis, Napoleon C. Gabriel, Jacob R. Cohen, June Cohen,

Appellants.

ENTERED
IN OFFICE DOCKET
8-27-74

Order of USCA Judge

It is hereby ordered that the motion made herein by counsel for the

appellants ~~appellee~~ ~~petitioner~~ ~~respondent~~

by notice of motion dated July 31, 1974 for leave to file and docket the record

be and it hereby is granted, ~~denied~~ without prejudice to appellees' rights to move to dismiss, etc.

~~It is further ordered that~~

JAMES L. OAKES

Circuit Judges

G.P.O. 443-171

3899-32C(2)

#15

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

NAPOLEON C. GABRIEL, JACOB R. COHEN and JUNE COHEN,

Objectants-Appellants,

-against-

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LeVASSEUR,

Plaintiffs-Appellees,

and

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT P. CHASE, T.C. DAVIS and THOMAS J. WILBANK,

Defendants-Appellees.

AFFIDAVIT IN OPPOSITION

Docket No. 75-2100

ENTERED
IN OFFICE DOCKET
9-17-74
Rec'd
Hand

State of New York
County of

Gerard M. Carey, as attorney for Napoleon C. Gabriel, opposed the motion of the attorneys for Levin, Alleghany and LeVasseur for the summary dismissal of the appeal of Gabriel from the judgment of the District Court (S.D.N.Y.) dated July 3, 1974 on the following grounds.

I 1) The grounds for appeal are substantial, legally interesting and important and if justice is to be done this appeal should continue.

2) The appellant has not delayed does not want delay, and any delay is attributable to movants.

3) The motion, in failing to unite the other pending appeals from the same action below (Gabriel and another appellant unknown), and in failing to notify Honnobis and other parties to the action below, lacks the necessary jurisdiction for this court to entertain.

4) The judgment below on fees was pre-mature.

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SUBSTANTIAL GROUNDS FOR APPEAL

II What started off below as an action for better dividens, jurisdiction being based solely on diversity, was settled as a class action for recapitalization of Mo Pac. over the protest of the appellant and many other owners of Class B Mo Pac. stock. Reducing the equity of B stockholders from 65.5% to 25.5 %, without any provision for appraisal for the appellant and others similarly situated.

III Despite statements of the movants and the court below that jurisdiction of the said action was also based on the Securities Exchange Act of 1934, deponent after many careful reviews of all the pleadings and amended pleadings below can find no allegation of any plaintiff below which purported to base jurisdiction of the court below on the S.E.C. Act, all allegations of jurisdiction being solely based on diversity of citizenship of the parties.

IV The legal questions to be raised on this appeal are as follows:

a) In a spurious class suit how far removed from the claim and the issues which were raised in the suit can a settlement go? The suit was for better dividens and was settled for recapitalization -- something for which no party had a cause of action, and the court had jurisdiction to approve the said settlement over the protest of appellant and other representative members?

b) In light of Zahn vs. International Paper Company, Seys Ct. Dec. 17, 1973, which requires that each and every member of the spurious class have the 10,000 jurisdictional amount when jurisdiction is based on diversity, did not the court below lack jurisdiction over this appellant and other class B stock member who beyond question lacked the jurisdictional amount?

c) Was not the failure of the settlement agreement to provide for an appraisal of the stock of dissident Class B stockholders, adn the restriction in the agreement and Missouri law that they be satisfied with the amount set down for settlement purposes only, a taking of appellants property without due process of law?

d) Was Alleghany, whose Class B stock was in trust under the jurisdiction of the I.C.C., and who was anxious to rid itself of its Class B holdings, truly representative of appellant and other Class B stockholders?

e) Since there are appeals pending from the I.C.C. approval of the settlement below, plus this appeal, and two other (Noumosis and Gabriel), and the court below having decided that fees be set only after all possibility of appeal be over, was not the judgment of July 3, 1974 settling the fees pre-mature?

APPELLANTS APPEAL IS TIMELY

V Appellant filed his notice of appeal from the July 3, 1974 judgment on July 23rd, 1974, appealing each and every prior order and judgment upon which it was based.

VI Upon the advice of the clerk of this court; deponent on July 31st made a motion to docket prior appeals of Moumosis and Gabriel, and on further advice to unite these two with Gabriels appeal of July 23rd. (see annexed sup. affidavit of deponent dated 23rd August 1974, and order of this Court dated 27 August 1974).

VII Deponent has prepared the record but this instant motion has held up the final determination of its content.

Wherefore deponent respectfully requests the motion to dismiss the appeal be itself dismissed.

Respectfully,

Dated 16 Sept. 1974

Gerard H. Carey
Attorney for
Napoleon C. Gabriel

Sworn to before me
on the 17 day Sept. 1974

RALPH L. NEGRI
Notary Public, State of New York
No. 24-8110600 Qual. in Kings County
Commission Expires March 30, 1976

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